118-356

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1281.

WO LEE, APPELLANT,

vs.

PETER HOPKINS, SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

FILED MARCH 5, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1281.

WO LEE, APPELLANT,

vs.

PETER HOPKINS, SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

INDEX.

	Original.	Print.
Assignment of errors	*a*	1
Petition	1	1
Order granting writ	26	10
Copy of writ and return	28	10
Exhibit A—Order No. 1569	33	12
Complaint	36	13
Commitment	40	14
Exceptions to return	45	15
Judgment	46	16
Clerk's certificate to judgment roll	48	16
Admissions of respondent	49	17
Application to board of fire wardens	53	18
health officer	55	21
Exhibit 1—Photograph	57	25
2 "	58	25
3 "	59	25
4 "	60	25
5 "	61	25
6 "	62	26
7 "	63	26

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Opinion	64	26
Order allowing appeal	70	32
Bond on appeal	72	33
Bond to appeal	75	34
Clerk's certificate	77	35
Citation	78	35
Proof of service of citation	79	36

a In the Supreme Court of the United States.

Wo Lee, Appellant,
vs.
Peter Hopkins, Sheriff of the City and County of San Francisco, Appellee.

To the honorable the Supreme Court of the United States.

The said Wo Lee complains of and assigns the following errors, viz:

1st. The court should have discharged the petitioner because the ordinance is against natural right, in that it requires the consent of the supervisors to carry on a necessary and harmless occupation without prescribing reasonable or any terms upon which such consent may be obtained, the law-makers reserving to themselves the right to grant or refuse permission arbitrarily.

2nd. The court should have discharged the petitioner because the ordinance is a legislative condemnation to heavy pains and penalties of all persons who wash clothes for hire in frame build-
b ings, whether constituting a nuisance or not, contrary to sub. 3, sec. 9 of art. I, of the Constitution of the United States, prohibiting bills of attainder.

3rd. The court should have discharged the petitioner because the immediate effect of the ordinance is to deprive the petitioner and others similarly conditioned of their property and property rights without due process of law or any legal process whatever, contrary to sec. 1, art. XIV, of the amendments to the Constitution of the United States.

4th. The court should have discharged the petitioner because the said ordinance is capable of being so operated and enforced as to discriminate against the petitioner and all other subjects of the Chinese Empire similarly conditioned, contrary to sec. 1 of the 14th Amendment, sec. 1977, U. S. Rev. Stats., and articles V and VI of the treaty of 1868, and articles II and III of the treaty of 1881 between the United States and China.

5th. The court should have discharged the petitioner because the said ordinance is operated and enforced against Chinese subjects only, contrary to the said constitutional, statutory, and treaty guaranties, the board of supervisors refusing all subjects of China
c permission to wash clothes for hire in frame buildings, while granting such permission to all other applicants.

Therefore the judgment should have been for the discharge of the appellant.

Wherefore appellant prays that the decision complained of be reversed, and that he have such relief as may be proper in the premises.

L. H. VAN SCHAICK,
Attorney for Appellant.

HALL McALLISTER and
D. L. SMOOT,
Of Counsel.

1—1281

d [Endorsed:] In the Supreme Court of the United States. Wo Lee, appellant, *vs.* Peter Hopkins, sheriff of the city and county of San Francisco, appellee. Assignment of error and prayer for reversal. L. H. Van Schaick, attorney for appellant. Hall, McAllister, and D. L. Smoot, of counsel.

1 *Petition for Writ.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

In the Matter of the Application of Wo Lee for a Writ of *Habeas Corpus.*

To the Honorable Lorenzo Sawyer, judge of said court, and said court:

The petition of Wo Lee humbly represents that he is unlawfully restrained of his liberty by Peter Hopkins, sheriff, at the old city hall, in the city and county of San Francisco, in the State of California.

To make manifest the illegality of the said restraint your petitioner respectfully shows:

I.

That he is a native of China, who, with the permission of the State of California and the United States of America, entered the State of California in the year 1855, and from that time up
2 to the filing of this petition has, with like permission, resided within the said State of California and labored faithfully for an honest livelihood.

II.

That your petitioner is still a subject of the Empire of China, and has never been permitted by the laws of this land to become a citizen thereof. For this reason he is compelled to crave your honor's consideration of the treaty stipulations between the United States and China in addition to the humane and liberal provisions contained in the organic and statutory laws governing your honor's country.

III.

For more than 25 years your petitioner has been engaged in the business of washing clothes at 318 Dupont street, in the city and county of San Francisco, and he numbers among his patrons many of the oldest and most respectable citizens in his neighborhood. Your petitioner's said business, while not lucrative, has been remunerative and highly valuable to him. His said business is
3 carried on in a house constructed of wood, like the great majority of buildings in San Francisco, and it has occupied its present site for more than 25 years, and has been continuously used as a laundry for more than 25 years.

IV.

While carrying on his said business in the said house your petitioner has scrupulously complied with every revenue, health, fire, and police regulation applicable to the laundry business in a frame house, notwithstanding the fact that these regulations have been numerous, in many cases onerous, and frequently cumulative, as will appear from a review of the city's changeful legislation on this subject.

V.

On May 4th, 1866, the board of supervisors of San Francisco adopted an ordinance, numbered 697, whereby the necessary work of cleansing soiled clothing was, for the first time in the history of the city, subjected to special burdens in the form of a license
4 tax upon all "laundries and laundry offices" employing vehicles "drawn by animal power." This ordinance, it would seem, contemplated nothing more than indemnification for the use of the city's highways by horses, for it placed no burdens upon and gave no attention to laundrymen who did not employ "animal power."

On June 23d, 1873, they adopted an ordinance, numbered 1098, whereby the theory or policy of order 697 was reversed, and laundrymen who did not use vehicles drawn by animal power were charged a license tax of fifteen dollars a quarter, while those who did use vehicles drawn by animal power were charged as follows: Where the establishment employed one vehicle the license tax was only two dollars per quarter; where it employed two vehicles the tax was four dollars per quarter; and where it employed more than two, no matter how great the monopoly, the tax was only fifteen
5 dollars per quarter, the same precisely that was required of the little establishment which could not afford to use animal power. When it is remembered that the Chinese who are engaged in the laundry business do not use vehicles drawn by animal power, the purpose of the city authorities to discriminate against them is painfully evident.

On February 24th, 1874, they adopted an ordinance, numbered 1135, whereby they repudiated the discriminating features of order 1098, and, as if ashamed of the same, returned to the terms of order 697, imposing the burdens of taxation upon those laundries only which were able to and did employ vehicles drawn by animal power.

On March 15th, 1876, they adopted an ordinance, numbered 1264, whereby they restored the discriminating features of order 1098, and once more placed the laundries which employed no vehicles drawn by animal power under a heavier burden of taxation
6 than those which employed one or two vehicles and under the same burden of taxation as those which employed more than two such vehicles. In the race between fair dealing and discrimination up to this point it is difficult to determine which holds the advantage.

On May 1st, 1878, they adopted an ordinance, numbered 1429,

whereby they repudiated the vehicle and horse-power feature of the preceding orders, and introduced the more natural and equitable method of adjusting the burden of taxation by the number of persons employed in the laundry. This system of fixing the license tax was too just to excite criticism.

On December 1st, 1879, they adopted an ordinance, numbered 1547, whereby the righteous system of order 1429 was re-enacted and continued in force.

Up to February 24th, 1880, the manner in which, the place where, or the character of the building in which the laundry business was carried on had not become the subject of municipal regula-
7 tion, the legislation up to this time simply placing it in the category of licensable occupations, with an ever-shifting standard by which to determine the amount of the license tax.

But on February 27th, 1880, they adopted an ordinance, numbered 1559, whereby they enacted that "all buildings erected and used as laundries within the corporate limits of 'the city and county of San Francisco' on and after March 1st, 1880, shall be constructed but one story in height, with brick or stone walls, not less than twelve inches in thickness, covered with a metal roof and provided with metal or metal-covered doors and window-shutters."

The penalty for violating this ordinance was fixed at a fine not exceeding one thousand dollars and imprisonment in the county jail not exceeding six months, or either.

At this time, to wit, February 24th, 1880, there were about 380 laundries in the city and county of San Francisco, of which
8 about 300 were owned and conducted by subjects of China, and of the whole number, viz., 380, about 370 were constructed of wood, the same material that constitutes nine-tenths of the houses in the city of San Francisco. The capital thus invested by the subjects of China was not less than two hundred and fifty thousand dollars, and they paid annually for rent, license, taxes, gas, and water about one hundred and eighty thousand dollars.

This order, 1559, made no provision for the practice of discrimination; so the board adopted on May 26th, 1880, an ordinance, number 1569, wherein they said: "It shall be unlawful from and after the passage of this order for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed of either brick or stone."

9 It will be observed by your honor that this order 1569 in no way informs or intends to inform the applicant what he must do or what he must be in order to secure the supervisional consent; it prescribes no rule of action as to qualifications, &c. If such an order be reasonable and valid, then discrimination by indirection may be practiced without limit and without redress.

On July 28th, 1880, they adopted a comprehensive system of police and sanitary regulations in an ordinance numbered 1587, wherein the following sections occur with reference to laundries, viz:

"SECTION 67. All buildings erected and used as laundries within

the corporate limits of the city and county, on and after March 1st, 1880, shall be constructed one story in height, with brick or stone walls not less than twelve (12) inches in thickness, covered with a metal roof, and provided with metal or metal-covered doors and windows shutters."

10 "SECTION 68. It shall be unlawful, from and after the passage of this order, for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone."

The maximum penalty for violating this ordinance is a fine not exceeding one thousand dollars, and imprisonment not exceeding six months.

It will be observed that this order 1587 applies to transactions as far back as March 1st, 1880, though not adopted until July 28th, 1880, nearly five months subsequent to the time when the prohibition is made operative.

On June 10th, 1882, they adopted an ordinance, numbered 1679, whereby an entire change was made as to the limits of the regulated district, and the conditions upon which laundries might be maintained.

11 Section 1 of that order made it unlawful to maintain a laundry east of Ninth and Larkin streets, without the consent of the board of supervisors, which consent could only be granted upon the recommendation of twelve or more citizens and tax-payers in the block where the laundry was to be established.

On October 21st, 1882, they adopted an ordinance, numbered 1691, in which a new and very elaborate system of regulation was brought into operation. This ordinance, after reciting the novel discovery that the maintenance of laundries, where clothes are cleaned for hire, is injurious and dangerous to public health, etc., made in substance as follows:

1st. That on and after January 1st, 1883, it shall be unlawful to maintain a laundry within that portion of the city and county which lies between the waters of the bay and a line drawn through Gough, Market, Ninth, and Channel streets without having first obtained a license or permit therefor, duly granted by resolution of the board of supervisors.

12 2nd. That the license collector shall not issue a license until the applicant therefor produces a certified copy of the aforesaid resolution.

3rd. That before license or permit is granted by the board the applicant must file with the clerk thereof—

An accurate description of the premises.

A certificate of the health officer that the premises are properly drained, and that all arrangements for conducting the business without injury to the sanitary condition of the neighborhood have been complied with.

And a certificate of the board of fire wardens that the stoves, washing and drying apparatus, and the appliances for heating smoothing-

irons are in good condition, and that their use is not dangerous to the surrounding property, and that all proper precautions have been taken, etc.

4th. That the health officer and the board of fire wardens shall, upon the applicant's request and without charge, make the
13 inspections necessary to enable them to give the aforesaid certificate.

5th. The laundrying shall not be done between 10 p. m. and 6 a. m., nor upon any portion of Sunday.

6th. That persons with contagious diseases shall not be allowed to remain in laundries within the prescribed district.

7th. That any person who shall conduct a laundry within the designated district without obtaining the permission of the board of supervisors and a license from the license collector is liable to a maximum penalty of $1,000 fine and six months imprisonment.

This ordinance, it will be observed, though burdensome and peculiar, describes the conditions upon which the board's permission may be obtained, in this respect rising to a higher plane of justice and reason than that occupied by 1569 and 1587, where the applicant is commanded to seek the haven of supervisorial consent, without chart or compass to protect him against the sunken rocks of discrimination.

14 On June 11th, 1883, they adopted an ordinance, numbered 1719, whereby the provision requiring the special consent of the supervisors was very properly dispensed with, and a provision requiring the certificate of the health officer and the board of fire wardens to be exhibited in some conspicuous place at the laundry was added, it would seem in lieu thereof, for, with these exceptions, orders 1691 and 1719 are identical in substance and similar in language. Section 9 of this last order declares that order No. 1691, and all orders or parts of orders in conflict with any of the provisions of this order, are hereby repealed.

On October 29th, 1883, by an ordinance numbered 1746, they amended section 1 of order 1719 by changing the limits of the laundry district.

On March 5th, 1884, they adopted an ordinance, numbered 1762, which corrects the reference to certain preceding orders, but in all other respects follows the very language of order 1719 as
15 amended by order 1746. This last-mentioned order, 1762, contains the following repealing clause, viz:

"Order No. 1691, and all orders and parts of orders in conflict with any of the provisions of this order, are hereby repealed."

Section 1 of order 1719, adopted June 11th, 1883, the same as amended October 29th, 1883, by order 1746; and the same section, in order 1762, of March 5th, 1884, dispenses with the special consent of the board of supervisors in the matter of conducting laundries within the given districts, and very naturally places the whole subject under the appropriate control of the health and fire departments of the city government, with strict injunctions to the police department to see that the provisions of order 1762, the last of this long and changeful series, are strictly enforced.

VI.

And your petitioner further shows that, notwithstanding this special consent of the supervisors has been dispensed with and
16 fully supplanted by a more reasonable and efficient system, yet within a few weeks your petitioner and more than two hundred and fifty of his countrymen have been arrested upon the charge of carrying on business without having such special consent, while those who are not subjects of China, and who are conducting eighty odd laundries under similar conditions, are left unmolested and free to enjoy the enhanced trade and profits arising from this hurtful and unfair discrimination. The business of your petitioner, and of those of his countrymen similarly situated, is greatly impaired, and in many cases practically ruined by this system of oppression to one kind of men and favoritism to all others.

VII.

And your petitioner further shows that though he was advised and satisfied that the law requiring the special consent of the board of supervisors had been substitued by another, and was no
17 longer in force; yet, as he and his countrymen similarly situated were anxious to comply with every regulation, whether valid or invalid, active or extinct, that did not make compliance impracticable, he, your petitioner, and more than two hundred others of his countrymen similarly situated, humbly and respectfully petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using as laundries, in many cases, for more than twenty years. Though these petitions were couched in the most respectful language, and though it was made known to the board of supervisors that the petitioners had complied with every regulation concerning health, safety, license tax, and everything else prescribed by the latest ordinances, especially order 1762, which is the last one on this subject, yet, notwithstanding all this, not a single one of the petitions presented by your petitioner and his countrymen was
18 granted, while not a single petition presented by persons who were not Chinese was refused; and yet the laundrymen who have thus been favored by the supervisors have no stronger claim to present, outside of race and national prejudice, than your petitioner and his countrymen; and your petitioner avers that the orders providing for this special consent were adopted for the purpose of discriminating against him and his countrymen, and that they are enforced so as to accomplish that result.

VIII.

And your petitioner further shows that the complaint filed against him for misdemeanor in the police court No. 2 of the city and county of San Francisco, on the 11th day of January, 1886, charged him with violating section 1 of order 1569 and section 68 of order 1587; in other words, that he had conducted a laundry in a house not made of brick or stone without having the special consent of the

board of supervisors. Upon this complaint, notwithstanding
19 the defense of your petitioner, he was convicted, and on the 20th day of January, 1886, he was sentenced to pay a fine of 10 dollars, and upon default to be imprisoned one day for each one dollar of the said fine. Your petitioner, having failed to pay the said fine, was arrested and is now detained by Peter Hopkins, the sheriff of the city and county of San Francisco, under a commitment based upon the said judgment.

IX.

Your petitioner avers that his said imprisonment is unlawful for the following reasons:

1st. The said ordinances requiring the special consent of the supervisors to the maintenance of laundries in houses not made of brick or stone are not now in force and operative because they have been substituted by others; they have been repealed, and they have lapsed by non-user.

2nd. They were never valid because unreasonable in requiring the house to be but one story in height, and to be constructed of
20 only two kinds of incombustible material, viz., brick and stone. They are also unreasonable because they require the special consent of the very body that has declared the matter a nuisance, and prohibited it under the extremest penalty at their disposal.

3d. They were never valid because they enlarge the law of nuisance without authority, and thereby and thereunder the destruction of property rights is accomplished without indemnification or due process of law. An ancient laundry is declared a nuisance by legislative edict, and the courts in which the question of nuisance or no nuisance should be tried are employed simply to graduate and apply the punishment, and thus give emphasis to the legislative judgment that it is a nuisance.

4th. They were never valid because the supervisors have not, under sec. 11, art. XI, of the State constitution, or under sub. 9, sec. 74, of the consolidation act, as alleged in the preamble to some of their ordinances on this subject, the power to constitute and
21 declare the necessary process of clothes-washing a nuisance, nor have they such power under any other provisions of the constitution of the State or the charter of the city, whether the maintenance of a laundry be a public nuisance or not is a mixed question of law and fact, to be determined in the courts, with reasonable opportunity to the accused to make defense as to this vital and essential question. While under the supplement to the consolidation act, approved March 16th, 1876, the board of health is authorized by the Legislature of the State to abate nuisances, yet neither the board of health nor the board of supervisors is clothed with the sovereign power to define and declare what shall constitute a nuisance.

5th. They were never valid because requiring the laundrymen to obtain the special consent of the supervisors without prescribing the conditions with which applicants must comply in order to de-

serve such consent does not constitute a "regulation or order"
22 within the meaning of those terms as used in sec. 74 of the consolidation act. The legislative will, instead of taking the form of an expressed rule of conduct, is held in reserve, and such action does not amount to the "regulation or order" which the board is authorized to make, and which they are requested to publish for the information and guidance of the people. It is the same as if the supervisors had, by ordinance, declared that they would not make known the terms and conditions upon which clothes-washing for hire might be carried on throughout the broad limits of San Francisco city and county in houses built of materials other than brick or stone, but that each particular one of hundreds of cases must be left to and be determined by the unmanifested and capricious will of the board.

6th. They are invalid because as constituted and enforced they deprive persons of liberty and property rights without due process of law, and deny to persons the equal protection of the laws,
23 contrary to section 1 of the 14th Amendment to the Constitution of the United States.

7th. They are invalid because as constituted they are calculated to be and are so enforced as to discriminate against your petitioner and his countrymen, contrary to the provisions of section 1977 of the Revised Statutes of the United States.

8th. They are invalid because as constituted they are calculated to be and are so enforced as to discriminate against your petitioner and his countrymen, contrary to existing treaty stipulations between the United States and China.

Wherefore your petitioner prays that a writ of *habeas corpus* may be granted, directed to the said Peter Hopkins, sheriff of the city and county of San Francisco, commanding him to have the body of your petitioner before your honor at a time and place therein to be specified, to do and receive what shall then and there be considered by
24 your honor concerning your petitioner, together with the time and cause of his detention and said writ, and that your petitioner may be restored to his liberty.

WO LEE, *Petitioner.*
L. H. VAN SCHAICK,
Attorney for Petitioner.

HALL McALLISTER AND
D. L. SMOOT,
Of Counsel.

STATE OF CALIFORNIA, }
City & County of San Francisco, } ss:

Wo Lee, being duly sworn, says that he is the petitioner named in the foregoing petition; that he has heard read the said petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters that he believes it to be true.

WO LEE.

Subscribed and sworn to before me this 20th day of January, 1886.

L. S. B. SAWYER,
Com'r U. S. Cir't Court, Dist. Cal.

(Endorsed:) Filed January 20, 1886. L. S. B. Sawyer, clerk.

Order Granting Writ.

In the Circuit Court of the United States, District of California.

In the Matter of WO LEE on *Habeas Corpus.* No. 3947.

Upon reading and filing the petition of Wo Lee, duly signed and verified by him, wherein it is alleged that Wo Lee is illegally imprisoned and restrained of his liberty by Peter Hopkings, sheriff of the city and county of San Francisco, from which petition it appears to me that a writ of *habeas corpus* ought to issue—

It is ordered that a writ of *habeas corpus* issue out of and under the seal of the circuit court of the United States for the district of California, directed to said Peter Hopkins, commanding him to have the body of said Wo Lee before the U. S. circuit court, in the court-room of said court, on the 22d day of January, 1886, at 11 o'clock in the forenoon of that day, to do and receive what shall then and there be considered concerning the said Wo Lee, together with the time and cause of his detention, and that he have then and there the said writ.

Dated at San Francisco, California, this 20 day of Jan., 1886.

(Signed) LORENZO SAWYER,
Circuit Judge.

(Endorsed:) Order. Filed this 20th day of January, 1886. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

Copy of Writ with the Return.

In the Circuit Court of the United States, District of California.

In the Matter of WO LEE on *Habeas Corpus.* No. 3947.

The President of the United States of America to Peter Hopkins, sheriff of the city and county of San Francisco, Greeting:

You are hereby commanded that you have the body of Wo Lee, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention by whatsoever name the said Wo Lee shall be called or charged before the honorable the circuit court of the United States for the district of California, at the court-room of said court, in the city and county of San Francisco, California, on the 22nd day of January, 1886, at 11 o'clock in the forenoon, to do and receive what shall then and there be considered concerning the said Wo Lee.

And have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Su-

preme Court of the United States, this 20th day of January, A. D. 1886.

[SEAL.] L. S. B. SAWYER, *Clerk.*

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoieg to be a copy of the writ of *habeas corpus* issued in the within-entitled matter.

Attest my hand and seal of said circuit court this 20th day of January, A. D. 1886.

[SEAL.] L. S. B. SAWYER, *Clerk.*

I hereby certify that on the 20th day of January, 1886, I received the writ, of which the within is a copy, and that on the 20th day of Jan'y, 1886, at San Francisco, in this district, I personally
30 served the said writ by delivering to and leaving the same with Peter Hopkins.

Dated San Francisco, Cal., Jan'y 20th, 1886.

M. M. DREW,
U. S. Marshal,
By B. J. AKERMAN,
Deputy Marshal.

(Endorsed:) Issued Jan. 20, 1886. Returnable Jan. 22, 1886. Filed on return this 21st day of January, 1886. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

31 *Copy of Return.*

In the Circuit Court of the United States, District of California.

In the Matter of Wo Lee on *Habeas Corpus.* No. 3947.

The President of the United States of America to Peter Hopkins, sheriff of the city and county of San Francisco, Greeting:

You are hereby commanded that you have the body of Wo Lee by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Wo Lee shall be called or charged, before the honorable the circuit court of the United States for district of California, at the court-room of said court, in the city and county of San Franciso, California, on the 22d day of January, 1866, at 11 o'clock in the forenoon, to do and receive what shall then and there
32 be considered concerning the said Wo Lee. And have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 20th day of January, A. D. 1886.

[SEAL.] L. S. B. SAWYER, *Clerk.*

In the Circuit Court of the United States, District of California.

Now comes Peter Hopkins, sheriff, &c., and respectfully shows that he holds Wo Lee by virtue of a commitment, a copy of which and of the complaint and of the orders referred to are hereto an-

nexed and made a part of this return, and marked Exhibit- A, B' and C.

Respectfully submitted,

PETER HOPKINS, *Sheriff.*

33 EXHIBIT A.

Order No. 1569, *Prescribing the Kind of Buildings in which Laundries may be Located.*

The people of the city and county of San Francisco do ordain as follows:

SECTION 1. It shall be unlawful from and after the passage of this order for any person or persons to establish, maintain, or carry on a laundry within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

SECTION 2. It shall be unlawful for any person to erect, build, or maintain, or cause to be erected, built, or maintained, over or upon the roof of any building now erected, or which may hereafter be erected, within the limits of said city and county any scaffold-
34 ing without first obtaining the written permission of the board of supervisors, which permit shall state fully for what purpose said scaffolding is to be erected and used, and such scaffolding shall not be used for any other purpose than that designated in such permit.

SECTION 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment.

In board of supervisors, San Francisco, May 24, 1880.

After having been published five successive days, according to law, taken up and passed by the following vote:

Ayes—Supervisors Schottler, Mason, Litchfield, Drake, Whitney, Eastman, Fraser, Taylor, Doane, Bayly, Torrey, Stetson.

JNO. A. RUSSELL, *Clerk.*

Approved.

San Francisco, May 26, 1880.

J. S. KALLOCH,

Mayor and ex-officio President [of] Board of Supervisors.

35 Section 68 of order 1587, passed July 28th, 1880, is in the same language as section 1 of order 1569.

36 *Complaint.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

In the Police Judge's Court No. 2 of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA *against* WOO LEE.

Personally appears before me this 25th day of August, A. D. 1885, W. D. Scott, who on oath makes complaint and deposes and says that on or about the 1st day of August, A. D. 1885, in the city and county of San Francisco, State of California, the crime of misdemeanor was committed, to wit, by Woo Lee (whose real name is unknown to this complain-t), who then and there did willfully and unlawfully carry on a certain laundry within the corporate limits of the city and county of San Francisco, to wit, at No. 318 Dupont street, without first having obtained the consent of the board of supervisors of said city and county so to do, said laundry
37 being then and there carried on in a building not constructed of brick or stone, thereby violating the provisions of section 1 of order No. 1569 and section 68 of order No. 1587 of the board of supervisors of the city and county of San Francisco, contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the People of the State of California; and this complainant upon oath accuses the said Woo Lee of having committed the said crime, and prays that the said accused may be brought before a magistrate and dealt with according to law.

W. D. SCOTT.

Subscribed and sworn to before me this 25th day of August, A. D. 1885.

JAMES LAWLER,
Judge of the Police Judges' Court No. 2 of the City and County of San Francisco.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

38 I, Bert McNulty, clerk of the police judge's court No. 2 of the city and county of San Francisco, State of California, do hereby certify that the foregoing and annexed copy — complaint is a full, true, and correct copy of the original complaint in the above-entitled criminal action filed in said police judges' court No. 2 on the 26th day of August, 1885, and that I, clerk aforesaid, have compared the foregoing and annexed copy with the original complaint in said action in said court, and that the same is a full, true, and correct transcript and copy from and of said original and of the whole thereof.

Witness my hand and the seal of the police judges' court No. 2 of

the city and county of San Francisco, this 20th day of January, 1886.

[SEAL.] BERT McNULTY,
Clerk of the Police Judges' Court No. 2
of the City and County of San Francisco.

39 Endorsed: Filed in the police judges' court No. 2 of the city and county of San Francisco this 26th day of August, 1885. Bert McNulty, clerk.

40 *Commitment. Police Judges' Court No. 2.*

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

In the Police Judges' Court No. 2 of the City and County of San Francisco, State of California.

THE PEOPLE OF THE STATE OF CALIFORNIA *vs.* WOO LEE.

The People of the State of California to the sheriff of the city and and county of San Francisco, Greeting:

Whereas Woo Lee, having been duly convicted in the police judges' court No. 2 of the city and county of San Francisco, State of California, of the crime of misdemeanor, as charged in the complaint, upon oath, in the above-entitled criminal action, and by said court sentensed and adjudged, as a punishment of said crime, to pay a fine of ten (10) dollars, and, in default of payment of said fine, to be imprisoned in the county jail of the city and county of
41 San Francisco, State of California, at the rate of one day for each one dollar of said fine until said fine is satisfied, as appears by the following full, true, and correct copy of the judgment rendered by said court, and entered in the minutes and docket of said court in the above-entitled criminal action:

"*Minute Docket.*"

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

In the Police Judges' Court No. 2 of the City and County of San Francisco, State of California.

In open court.

COURT-ROOM OF SAID COURT,
WEDNESDAY, *January 20th*, 1886.

Present: Presiding, Hon. James Lawler, judge of the police judges' court No. 2.

THE PEOPLE OF THE STATE OF CALIFORNIA *vs.* WOO LEE.

Convicted of misdemeanor. Vio. laundry order.

In this action the defendant personally appears for sentence.

42 The court renders its judgment that, whereas the said Woo Lee, having been duly convicted in this court of the crime of misdemeanor—

It is ordered and adjudged, as a punishment therefor, that the said Woo Lee pay a fine of ten (10) dollars, and in default of payment thereof that said Woo Lee be imprisoned in the county jail of this city and county, at the rate of one day for each one dollar of fine, until said fine is satisfied.

And whereas said fine has not been paid, these are, therefore, in the name of the people of the State of California, to command you, the said sheriff of the city and county of San Francisco, forthwith to take, arrest, and safely keep and imprison the said Woo Lee in the county jail of the said city and county of San Francisco, State of California, at the rate of one day for each one dollar of said fine, until said fine is satisfied, and these presents shall be your authority for the same.

43 Witness my hand and the seal of the said police judges' court No. 2 this 20th day of January, 1886.

[SEAL.] JAMES LAWLER,
Judge of the Police Judges' Court No. 2 of the City and County of San Francisco.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

I, Bert McNulty, clerk of the police judges' court No. 2 of the city and county of San Francisco, State of California, do hereby certify that the foregoing and annexed copy [of] commitment is a full, true, and correct copy of the original commitment in the above-entitled criminal action filed in said police judges' court No. 2 on the 20th day of January, 1886, and that I, clerk aforesaid, have compared the foregoing and annexed copy with the original commitment in said action in said court, and that the same is a full, true, and
44 correct transcript and copy from and of said original, and of the whole thereof.

Witness my hand and the seal of the police judges' court No. 2 of the city and county of San Francisco this 20th day of January, 1886.

[SEAL.] BERT McNULTY,
Clerk of the Police Judges' Court No. 2 of the City and County of San Francisco.

(Endorsed:) Filed on return January 22, 1886. L. S. B. Sawyer, clerk.

45 *Exception to Return.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

In Re WO LEE on *Habeas Corpus.* No. 3947.

The petitioner, Wo Lee, excepts to the sufficiency of the respond-

ent's return, upon the ground that the said sections referred to in said return are invalid, inoperative, unreasonable, discriminative, and repealed, and the said petitioner also refers for facts to his said petition and the respondent's admissions in writing herein filed.

L. A. VAN SCHAICK,
Attorney for Petitioner.

HALL McALLISTER AND
D. L. SMOOT,
Of Counsel.

Endorsed: Filed February 1, 1886, *nunc pro tunc* as of January 22d, 1886.

L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON,
Deputy Clerk.

46 *Judgment.*

United States of America, Circuit Court of the United States, Ninth Judicial Circuit, District of California.

In the Matter of WO LEE on *Habeas Corpus.* No. 3947.

This matter having been regularly brought on for hearing before the court and the judges thereof upon the issues joined herein, and the same having been duly heard and submitted, and due consideration thereon had, it is by the court and the judges thereof, now here ordered and adjudged—

That Wo Lee, in whose behalf the writ of *habeas corpus* herein was sued out, was not, at the date of said petition, illegally restrained of his liberty, as alleged therein.

It is therefore ordered that he be remanded by the marshal to the custody from which he has been taken.

Entered this 26th day of January, 1886.

L. S. B. SAWYER, *Clerk.*

47 I hereby certify that the foregoing is a full, true, and correct copy of an original judgment made and entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 26th day of January, A. D. 1886.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Endorsed: Filed January 26, 1886. L. S. B. Sawyer, clerk.

48 *Clerk's Certificate.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

In the Matter of WO LEE on *Habeas Corpus.* No. 3947.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, within and for the district of Cal-

ifornia, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the therein-entitled action.

Witness my hand and the seal of said circuit court this 26th day of January, A. D. 1886.

[SEAL.] L. S. B. SAWYER, *Clerk*,
By F. D. MONCTON,
Deputy Clerk.

(Endorsed:) Judgment-roll. Filed January 26th, 1886. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

49 *Admission of Respondent.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

In Re WO LEE on *Habeas Corpus.*

Respondent admits that petitioner is a native of China, and came to California A. D. 1855.

That petitioner is still a subject of the Emperor of China.

That petitioner has been engaged in the laundry business at 318 Dupont street for 25 years last past.

That petitioner had a license, a certificate from the board of fire wardens, and a certificate from the health officer, copies of which are hereto annexed.

That the board of supervisors assumed to pass order number 697 May 4th, 1866, and that the board passed the following orders:

Order 1098, June 23rd, 1873.
" 1135, Feb'y 4th, 1874.
Order 1264, March 15th, 1876.
50 " 1429, May 1st, 1878.
" 1547, Dec. 15, 1879.
Order 1559, Feb. 27th, 1880.
" 1569, May 26th, 1880.
" 1587, July 28th, 1880.
" 1679, June 10th, 1882.
" 1691, Oct. 21*th*, 1882.
" 1719, June 21st, 1883.
" 1746, Nov. 6th, 1883.
" 1762, March 5th, 1884.
" 1767, April 8th, 1884.

That petitioner applied to the board of supervisors, to wit, June 1st, 1885, for consent of said board to maintain and carry on his laundry, but that said board, to wit, July 1st, 1885, refused said consent.

That the city license of petitioner is in force and expires May 1st, 1886.

Respondent, in order to save time, makes the following admissions, reserving his objection and exception to the admissability of the evi-
51 dence, the respondent contending that the following admissions are immaterial and irrelevant: Respondent admits that the statement on pages 8 and 9 of the petition, as follows, to wit: Feb-

ruary 24th, 1880, there were about 320 laundrys in the city and county of San Francisco, of which about 240 were owned and conducted by subjects of China; and of the whole number, viz., 320, about 310 were constructed of wood. The capital thus invested by the subjects of China was not less than two hundred thousand dollars, and they paid annually for rent, license, taxes, gas, and water about one hundred and eighty thousand dollars," is substantially true and correct.

Respondent also admits that the statement contained in subdivision VI of the petition as to arrests, &c., is substantially true and correct, with this qualification, that 80 odd laundries referred to are in wooden buildings without scaffolds on the roofs.

52 Respondent admits that petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than 20 years, and such petitions were denied, and all the petitions of those who were not Chinese, with one exception, of Mrs. Mary Meagles, were granted.

ALFRED CLARKE,
Counsel for Respondent.

53 *Application to Board of Fire Wardens for a Certificate.*

To the board of fire wardens of the city and county of San Francisco:

GENTLEMEN: The undersigned respectfully request- that you grant, under order No. 1719, a certificate as to the condition of premises situated at No. 318 Dupont street, the same to be opened as a laundry and conducted and operated by Wo Lee.

(Signature) WO LEE.

SAN FRANCISCO, *March* 20, 1884.

I, David Scannell, president board of fire wardens of the city and county of San Francisco, do hereby certify that the above-described premises have been inspected by the board of fire wardens, and upon such inspection said board found that all proper arrangements for carrying on the business, that the stoves, washing and drying apparatus, and the appliances for heating smoothing-irons are in good condition, and that their use is not dangerous to the surrounding property from fire, and that all proper precautions have been taken to comply with the provisions of order No. 1617, defining "the fire limits of the city and county of San Francisco, and making regulations concerning the erection and use of buildings in said city and county," and of order No. 1670, "prohibiting the kindling, maintenance, and use of open fires in houses."

(Signature) DAVID SCANNELL,
President Board of Fire Wardens.

Order No. 1670, *Prohibiting the Kindling, Maintenance, or Use of Open Fires in Houses.*

The people of the city and county of San Francisco do ordain as follows:

SECTION 1. No person shall kindle or maintain any fire of charcoal, wood, or other combustible material, in or upon any open tin, metal can, or any earthenware vessel whatsoever, in any room, entry, or passage of any house in this city and county, or in any furnace or stove of any kind, unless the same be connected by means of a good sheet-iron flue or pipe with a brick or earthen pipe chimney to conduct the smoke into said brick or earthern pipe chimney, in conformity with the provisions of section 21 of order No. 1617 of this board, said chimney to be carried to a height of at least 4 feet above the roof of said house, as required by section 23 of said order 1617.

Provided, however, that the provisions of this order shall not be deemed to apply to portable stoves, furnaces, or lamps used by artisans in the prosecution of their regular and lawful business, or to properly constructed kerosene, gasoline, or gas stoves used for cooking purposes or for the heating of chambers.

SECTION 2. Any person or persons violating the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding one hundred dollars, or by imprisonment for a period not exceeding thirty days, or by both such fine and imprisonment.

SECTION 3. It shall be the duty of the fire wardens and the chief of police to take such steps and issue such orders to the members of the force under their control, respectively, as shall insure the arrest and punishment of any and all persons violating the provisions of this order.

54 *Order No.* 1719, *as Amended by* 1746.

Regulating the establishment and maintenance of public laundries and public wash-houses within certain limits in the city and county of San Francisco.

Whereas the indiscriminate establishment of public laundries and public wash-houses where clothes and other articles are cleansed for hire is injurious and dangerous to public health and public safety, and prejudicial to the well-being and comfort of the community, and depreciates the value of property in those neighborhoods where such public laundries and such public wash-houses are situate:

Under and in conformity to the authority vested by section 11 of article XI of the constitution of the State of California, and of subdivision 9 of section 74 of an act entitled "An act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof," approved April 19, 1856, and the several acts amendatory thereto and supplementary thereof:

The people of the city and county of San Francisco do ordain as follows:

SECTION 1 (as amended Nov. 6, 1883, by order No. 1746). On and after the passage of this order it shall be unlawful for any person or persons to establish, maintain, or carry on the business of a public laundry or a public wash-house where clothes or other articles are cleansed for hire within that portion of the city and county of San Francisco lying and being within the following boundaries: Commencing at the intersection of Devisadero street with the waters of the Bay of San Francisco; thence following the bay shore easterly and southerly to the easterly end of Channel street; thence along Channel street in a westerly direction to Potrero avenue; thence southerly along Potrero avenue to Army street; thence westerly along Army street to Dolores street; thence northerly along Dolores street to and across Market street to Ridley street; thence westerly along Ridley street to Devisadero street, and thence northerly along Devisadero street to the bay and point of commencement, without having first complied with the conditions hereinafter specified.

SEC. 2. It shall be unlawful for any person or persons to conduct or maintain a public laundry or wash-house within the district named in section 1 of this order without having first obtained a certificate signed by the health officer of the city and county of San Francisco that the premises are properly and sufficiently drained, and that all proper arrangements for carrying on the business without injury to the sanitary condition of the neighborhood have been complied with, and particularly that the provisions of section 4 of order No. 1666 of this board have been complied with; also a certificate signed by the board of fire wardens of the city and county of San Francisco, that the stoves, washing and drying apparatus and the appliances for heating smoothing-irons are in good condition, and that their use is not dangerous to the surrounding property from fire, and that all proper precautions have been taken to comply with the provisions of order No. 1617, defining "the fire limits of the city and county of San Francisco, and making regulations concerning the erection and use of buildings in said city and county," and of order No. 1670, "prohibiting the kindling, maintenance, and use of open fires in houses."

SEC. 3. It shall be the duty of the health officer, also the board of fire wardens respectively, upon application from any person or persons proposing to open or conduct the business of a public laundry within that portion of the city and county designated and described in section 1 of this order, to inspect the premises in which it is proposed to carry on said business, or in which said business is being carried on, with a view of ascertaining whether the said premises are provided with proper drainage and sanitary appliance, also whether the provisions of orders Nos. 1617 and 1670 of this board have been complied with, and, if found in all respects satisfactory, then to issue to said applicants the certificates provided for in section 2 of this order.

No charge whatever shall be made or compensation or fee collected or received for the performance of any of the services required by the provisions of this order, in the inspection of premises or the

issuance of a certificate, but all such services shall be performed free of charge.

SEC. 4. No person or persons owning or employed in the public laundries or public wash-houses provided for in section 1 of this order shall wash or iron clothes between the hours of 10 o'clock p. m. and 6 o'clock a. m., nor upon any portion of that day known as Sunday.

SEC. 5. No person or persons engaged in the laundry business within that portion of this city described in section 1 of this order shall permit any person suffering from any infectious or contagious disease to lodge, sleep or remain within or upon the premises used by him, her or them for the purposes of a public laundry.

SEC. 6. Any person or persons establishing, maintaining or carrying on the business of a public laundry or a public wash-house, where clothes or other articles are cleansed for hire, within the limits of this city and county, as described in section 1 of this order, without first having complied with the provisions of section 2 of this order, shall be guilty of misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, or by imprisonment of more than six months, or by both; and any person who shall violate the provisions of sections 4 or 5 of this order shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than five dollars, nor more than fifty dollars, or by imprisonment not more than one month, or by both such fine and imprisonment.

SEC. 7. The certificates from the health officer and the board of fire wardens, as required by section 2 of this order, shall be exhibited in some conspicuous place on the premises, and the same shall be produced on the demand of any officer of the city and county of San Francisco.

SEC. 8. The police authorities are hereby directed to have the provisions of this order strictly enforced.

SEC. 9. Order No. 1691, and all orders or parts of orders in conflict with any of the provisions of this order, are hereby repealed.

In board of supervisors, San Francisco, June 18, 1883.

After having been published five successive days, according to law, taken up and passed by the following vote:

Ayes—Supervisors Sullivan, Reichenbach, Shirley, Burton, Smith, Pond, Griffin, Strother, Lewis, Ranken, Ashworth.

Absent—Supervisor James.

JNO. A. RUSSELL, *Clerk.*

Approved, San Francisco, June 25, 1883.

WASHINGTON BARTLETT,
Mayor and ex-officio President Board of Supervisors.

55 *Application to Health Officer for a Certificate.*

To the health officer of the city and county of San Francisco:

SIR: The undersigned respectfully requests that you grant, under order No. 1719, a certificate as to the sanitary condition of premises

situated at No. 318 Dupont street, between Bush and Sutter streets, the same to be opened as a laundry and conducted and operated by

(Signature) WO LEE.

HEALTH OFFICE,
SAN FRANCISCO, *March* 4, 1884.

I, J. L. Meares, M. D., health officer of the city and county of San Francisco, do hereby certify that the above-described premises have been inspected by me, and that I find that they are properly and sufficiently drained, and that all proper arrangements for carrying on the business of a laundry, without injury to the sanitary condition of the neighborhood, have been complied with, and particularly *that* the provisions of section 4 of order 1666 of the board of supervisors.

(Signature) J. L. MEARES, M. D.,
Health Officer,
By JOHN KELLEY, JR.,
Health Inspector.

SECTION 4. No person shall construct or maintain, or suffer to be or remain, upon his or her premises, or premises under his or her control, any privy, or privy vault, cesspool, sink, or drain without connecting the same by means of cement, ironstone, or iron pipe with the street sewer, in such a manner that it will be effectually drained and purified, if there be a sewer in the street on which said premises may be situated with which the same can be connected. Every drain or branch sewer hereafter constructed which shall connect with a dwelling house or building, or with a privy, privy vault, or cesspool, shall be constructed of cement, ironstone, or iron, and be provided with some apparatus or means by which such drain or branch sewer may be effectually flushed and cleansed, and shall also be provided with a trap or apparatus which will effectually prevent the escape of gases from the sewer into such dwelling house, building, privy, privy vault, or cesspool, which trap or apparatus shall, in all cases, when practicable, be placed under the sidewalk, and be so constructed and placed that it can be readily and conveniently examined and inspected.

56 *Order No.* 1719, *as Amended by* 1746.

Regulating the establishment and maintenance of public laundries and public wash-houses within certain limits in the city and county of San Francisco.

Whereas the indiscriminate establishment of public laundries and public wash-houses, where clothes and other articles are cleansed for hire, is injurious and dangerous to public health and public safety; and prejudicial to the well-being and comfort of the community, and depreciates the value of property in those neighorhoods where such public laundries and such public wash-houses are situate:

Under and in conformity to the authority vested by section 11 of article XI of the constitution of the State of California, and of sub-

division 9, of section 74, of an act entitled, "An act to repeal the several charters of the city of San Francisco, to establish the boundaries of the city and county of San Francisco, and to consolidate the government thereof," approved April 19, 1856, and the several acts amendatory thereto and supplementary thereof, the people of the city and county of San Francisco do ordain as follows:

SECTION 1 (as amended Nov. 6, 1883, by order No. 1746). On and after the passage of this order it shall be unlawful for any person or persons to establish, maintain, or carry on the business of a public laundry or a public wash-house, where clothes or other articles are cleansed for hire, within that portion of the city and county of San Francisco lying and being within the following boundaries: Commencing at the intersection of Devisadero street with the waters of the Bay of San Francisco; thence following the bay shore easterly and southerly to the easterly end of Channel street; thence along Channel street in a westerly direction to Potrero avenue; thence southerly along Potrero avenue to Army street; then- westerly along Army street to Dolores street; thence northerly along Dolores street to and across Market street to Ridley street; thence westerly along Ridley street to Devisadero street, and thence northerly along Devisadero street to the bay and point of commencement, without having first complied with the conditions hereinafter specified.

SEC. 2. It shall be unlawful for any person or persons to conduct or maintain a public laundry or wash-house within the district named in section 1 of this order without having first obtained a certificate, signed by the health officer of the city and county of San Franciso, that the premises are properly and sufficiently drained, and that all proper arrangements for carrying on the business, without injury to the sanitary condition of the neighborhood, have been complied with, and particularly that the provisions of section 4 of order No. 1666 of this board have been complied with; also a certificate, signed by the board of fire wardens of the city and county of San Francisco, that the stoves, washing, and drying apparatus, and the appliances for heating smoothing irons are in good condition, and that their use is not dangerous to the surrounding property from fire, and that all proper precautions have been taken to comply with the provisions of order No. 1617, defining "the fire limits of the city and county of San Francisco, and making regulations concerning the erection and use of buildings in said city and county," and of order No. 1617, "prohibiting the kindling, maintenance, and use of open fires in houses."

SEC. 3. It shall be the duty of the health officer, also the board of fire wardens, respectively, upon application from any person or persons proposing to open or conduct the business of a public laundry within that portion of the city and county designated and described in section 1 of this order, to inspect the premises in which it is proposed to carry on said business, or in which said business is being carried on, with a view of ascertaing whether the said premises are provided with proper drainage and sanitary appliance, also whether the provisions of orders Nos. 1617 and 1670 of this board have been complied with, and, if found in all respects satisfactory, then to issue

to said applicants the certificates provided for in section 2 of this order.

No charge whatever shall be made or compensation or fee collected or received for the performance of any of the services required by the provisions of this order in the inspection of premises or the issuance of a certificate, but all such services shall be performed free of charge.

SEC. 4. No person or persons owning or employed in the public laundries or public wash-houses provided for in section 1 of this order shall wash or iron clothes between the hours of 10 o'clock p. m. and 6 o'clock a. m., nor upon any portion of that day known as Sunday.

SEC. 5. No person or persons engaged in the laundry business within that portion of this city described in section 1 of this order shall permit any person suffering from any infectious or contagious disease to lodge, sleep, or remain within or upon the premises used by him, her, or them for the purposes of a public laundry.

SEC. 6. Any person or persons establishing, maintaining, or carrying on the business of a public laundry, or a public wash-house, where clothes or other articles are cleansed for hire, within the limits of this city and county, as described in section 1 of this order, without first having complied with the provisions of section 2 of this order, shall be guilty of misdemeanor, and, upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment of [not] more than six months, or by both; and any person who shall violate the provisions of section 4 or 5 of this order shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than five dollars nor more than fifty dollars, or by imprisonment not more than one month, or by both such fine and imprisonment.

SEC. 7. The certificates from the health officer and the board of fire wardens, *are* required by section 2 of this order, shall be exhibited in some conspicuous place on the premises, and the same shall be produced on the demand of any officer of the city and county of San Francisco.

SEC. 8. The police authorities are hereby directed to have the provisions of this order strictly enforced.

SEC. 9. Order No. 1691, and all orders or parts of orders in conflict with any of the provisions of this order are hereby repealed.

In board of supervisors, San Francisco, June 18, 1883.

After having been published five successive days, according to law, taken up and passed by the following vote:

Ayes—Supervisors Sullivan, Reichenbach, Shirley, Burton, Smith, Pond, Griffin, Strother, Lewis, Ranken, Ashworth.

Absent—Supervisor James.

JNO. A. RUSSELL, *Clerk.*

Approved, San Francisco, June 25, 1883.

WASHINGTON BARTLETT,

Mayor and ex-officio President Board of Supervisors.

Endorsed: By order of court, filed February 1st, 1886, *nunc pro tunc* as of January 22d, 1886. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

57 3947. *Filed Jan.* 22, 1886. *L. S. B. Sawyer, Clerk.*

(Here follows photograph marked p. 57.)

In the Supreme Court of the State of California.

In Re YICK WO on *Habeas Corpus.* No. 20126. In Bank.

EXHIBIT 1 FOR RESPONDENT.

Chinese laundry house of Yick Wo, at No. 349 Third street, San Francisco, as seen from the south.

58 3947. *Filed Jan.* 22, 1886. *L. S. B. Sawyer, Clerk.*

(Here follows photograph marked p. 58.)

In the Supreme Court of the State of California.

In Re WICK WO on *Habeas Corpus.* No. 20126. In Bank.

EXHIBIT 2 FOR RESPONDENT.

Chinese laundry house of Yim Kee, at No. 1233 Howard street, San Francisco, as seen from the north.

59 3497. *Filed Jan.* 22, 1886.

(Here follows photograph marked p. 59.)

In the Supreme Court of the State of California.

In Re YICK WO on *Habeas Corpus.* No. 20126. In Bank.

EXHIBIT 3 FOR RESPONDENT.

Chinese laundry house of Yim Kee, at No. 1233 Howard street, San Francisco, as seen from the west.

60 3947. *Filed Jan.* 22*d*, 1886. *L. S. B. Sawyer, Clerk.*

(Here follows photograph marked p. 60.)

In the Supreme Court of the State of California.

In Re YICK WO on *Habeas Corpus.* No. 20126. In Bank.

EXHIBIT 4 FOR RESPONDENT.

Chinese laundry house of We Wo, at No. 505 Munia street, San Francisco, as seen from the west.

61 3947. *Filed Jan.* 22, 1886. *L. S. B. Sawyer, Clerk.*

(Here follows photograph marked p. 61.)

In the Supreme Court of the State of California.

In Re YICK WOO on *Habeas Corpus.* No. 20126. In Bank.

EXHIBIT 5 FOR RESPONDENT.

Chinese laundry house of Sang Lee, at No. 924 Howard street, San Francisco, as seen from the north.

62 3947. *Filed Jan.* 22, 1886. *L. S. B. Sawyer, Clerk.*

(Here follows photograph marked p. 62.)

In the Supreme Court of the State of California.

In Re WICK WO on *Habeas Corpus.* No. 20126. In Bank.

EXHIBIT 6 FOR RESPONDENT.

Chinese laundry house of Sang Lee, at No. 924 Howard street, San Francisco, as seen from the east.

63 3947. *Filed Jan.* 22, 1886. *L. S. B. Sawyer, Clerk.*

(Here follows photograph marked p. 63.)

In the Supreme Court of the State of California.

In Re WO on *Habeas Corpus.* No. 20126. In Bank.

EXHIBIT 7 FOR RESPONDENT.

Chinese laundry house of We Wo, at No. 505 Munia street, San Francisco, as seen from the north.

64 *Opinion.*

Circuit Court, District of California.

In Re WO LEE on *Habeas Corpus.*

JANUARY 26, 1886.

State and circuits courts.—The supreme court of the State and the United States circuit court have concurrent original jurisdiction on *habeas corpus* to inquire into the constitutionality and validity of a city ordinance alleged to have been passed in contravention of the Fourteenth Amendment to the Constitution of the United States; but the circuit court should not overrule the solemn judgment of the supreme court of the State upon this question, where there is reasonable ground for doubt. In such cases the question should be referred to the Supreme Court of the United States for an authoritative decision of the doubtful point.

Same—Laundry ordinance—Constitutional law.—On this ground the circuit court declined to hold a city ordinance invalid, as being in contravention of the Fourteenth Amendment to the Constitution of the United States, which ordinance made it an offense "for any person or persons to establish, maintain, or carry on a laundry within the cor-

porate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone."

Before Sawyer, circuit judge, and Sabin, district judge.

Hall McAllister, D. L. Smoot, and L. H. Van Schaick, for the petitioner.

Alfred Clarke *contra.*

By the court, Sawyer, circuit judge. In the laundry ordinance case, 7 Saw. 531, Mr. Justice Field and myself held an ordinance to be void under the Fourteenth Amendment of the National Constitution, on the ground that as a condition of obtaining a license the party desiring to carry on that business must obtain the consent of the board of supervisors, which could only be granted upon the recommendations of not less than twelve citizens and tax payers in the block in which the laundry was to be carried on; and we also held that a party arrested for violation of that ordinance was entitled to be discharged on writ of *habeas corpus* by the circuit court of the United States under the provisions of section 753 of the Revised Statutes of the United States. In the course of the decision in that case Mr. Justice Field observed that in neither case can licenses "be required as a means of prohibiting any avocations of life which are not injurious to public morals, nor offensive to the senses, nor dangerous to the public health and safety; *nor can conditions*
65 *be annexed to their issue which would tend to such prohibition.* The exaction *for any such purpose* of a license to pursue a vocation of this nature, or making its issue dependent upon conditions having such a tendency, *would be an abuse of authority. Such is evidently the tendency and purpose of the condition required in the ordinance in question in this case, and we have no doubt of its invalidity:*" 7 Saw. 531. And such must necessarily be the *tendency* of any ordinance that requires the consent, which may be arbitrarily given or withheld, at their discretion, of the board of supervisors, or of any other body or person, as a condition precedent to the exercise of a lawful and necessary calling.

After that decision the ordinance was amended by omitting the requirement of the assent of twelve citizens and tax-payers in the block; but it still prohibited carrying on a laundry business, after complying with numerous onerous conditions, without in addition "having first obtained a license or permit therefor, duly granted by resolution of the board of supervisors." It prescribed no specific conditions, the performance of which should entitle the party to a license or permit; but the license or permit, after performance of all the other prescribed conditions, still depended upon the will or pleasure of the board of supervisors. It simply struck out the consent of the twelve tax-payers on the block, and left it to rest upon the consent of the board alone, thereby limiting the number of parties to the consent, without abandoning the principle. For this reason, in Tom Tong's case, the circuit judge thought the objection still remained unobviated. On this point we think he is also sustained by authority. Mayor of Baltimore *v.* Radecke, 49 Md. 217; 33 Am. Rep., 243–245.

In that case, in commenting upon the ordinance then under consideration, the court says:

"It commits to the unrestrained will of a single public officer the power to notify every person who now employs a steam-engine in the prosecution of any business in the city of Baltimore to cease to do so, and by providing compulsory fines for every day's disobedience of such notice, and order of removal, *renders his power over the use of steam in that city practically absolute, so that he may prohibit its use altogether.* But if he should not choose to do this, but only to act in particular cases, *there is nothing in the ordinance to guide or control his action. It lays down no rules by which its impartial execution can be secured, or partiality and oppression prevented.* It is clear that giving and enforcing these notices *may, and quite likely will, bring ruin to the business of those against whom they are directed, while others from whom they are withheld may be actually benefited by what is thus done to their neighbors, and when we remember that this action or non-action may proceed from enmity or prejudice, from partisan zeal or animosity, from favoritism and other improper influences and motives easy of concealment, and difficult to be detected and exposed, it becomes unnecessary to suggest, or comment upon, the injustice capable of being wrought under*
66 *cover of such a power, for that becomes apparent to every one who gives to the subject a moment's consideration. In fact, an ordinance which clothes a single individual with such power hardly falls within the domain of law, and we are constrained to pronounce it inoperative and void.*" And it can make no difference that the arbitrary discretion is reserved to a *board, instead of a single individual.* Indeed, where the power is reserved to a board there is a divided responsibilty, and each member is less sensitive to its pressure upon his individual conscience. Each gives countenance and support to the others who act with him. Thus they mutually sustain each other and break the force of the weight of responsibility.

The district judge of this district, however, not being satisfied, we certified a division of opinion to the supreme court, thereby submitting the question for its decision as to the constitutionality of the ordinance as so amended, and the points of difference appear in *Ex parte* Tom Tong, 108 U. S., 557. See especially points 3 to 6, inclusive. Unfortunately—the party being confined for an offense against the laws—we supposed the certificate to be governed by the provisions of the statute relating to criminal cases, but the supreme court held the practice in civil cases to be applicable, and declined to take jurisdiction, because a final judgment had not been rendered before the writ of error was sued out. Thus our misapprehension of the practice prevented a decision of the important, vigorously litigated, and vital questions presented. Had that case been decided, probably there would not have been any occasion for this case, as the principle involved would have been authoritatively settled; but we are ourselves unable to distinguish this case from either of the preceding. If the court was right in those cases, then it seems to us that the ordinance now in question must be void upon similar grounds. Section 1 provides that "It shall be unlawful, from and after the passage of this order, for any person or persons to establish,

maintain, or carry on a laundry *within the corporate limits of the city and county of San Francisco without having first obtained the consent of the board of supervisors*, except the same be located in a building constructed of either brick or stone." Thus, in a territory some ten miles wide by fifteen or more miles long, much of it still occupied as mere farming and pasturage lands, and much of it unoccupied sand banks, in many places without a building within a quarter or half a mile of each other, including the isolated and almost wholly unoccupied Goat Island, the right to carry on this, when properly guarded, harmless and necessary occupation, in a wooden building, is not made to depend upon any prescribed conditions giving a right to anybody complying with them, but *upon the consent or arbitrary will of the board of supervisors.*

In three-fourths of the territory covered by the ordinance there is no more need of prohibiting or regulating laundries than if they were located in any portion of the farming regions of the State.

Hitherto the regulation of laundries has been limited to the thickly settled portions of the city. Why this unnecessary extension of the limits affected, if not designed to prevent the establishment of laundries after a compulsory removal from their present locations within practicable reach of the customers or their proprietors?

And the uncontradicted petition shows that all Chinese applications are, in fact, denied, and those of Caucasians granted—
67 thus, in fact, making the discriminations in the administration of the ordinance *which its terms permit.*

The fact that the right to give consent is reserved in the ordinance shows that carrying on the laundry business in wooden buildings is not deemed of itself necessarily dangerous. It must be apparent to every well-informed mind that a fire, properly guarded, for laundry purposes in a wooden building is just as necessary, and no more dangerous than a fire for or cooking purposes or for warming a house.

If the ordinance under consideration is valid, then the board of supervisors can pass a valid ordinance preventing the maintenance in a wooden building of a cooking stove, heating apparatus, or a restaurant within the boundaries of the city and county of San Francisco without the consent of that body *arbitrarily* given or withheld, as their prejudices or other motives may dictate.

If it is competent for the board of supervisors to pass a valid ordinance prohibiting the inhabitants of San Francisco from following any ordinary, proper, and necessary calling within the limits of the city and county, except at its arbitrary and unregulated discretion and special consent, and it can do so if this ordinance is valid, then it seems to us that there has been a wide departure from the principles that have heretofore been supposed to guard and protect the rights, property, and liberties of the American people.

And if by an ordinance general in its terms and form, like the one in question, by reserving an arbitrary discretion in the enacting body to grant or deny permission to engage in a proper and necessary calling, a discrimination against any class can be made in its execution, thereby evading and, in effect, nullifying the provisions of the National Constitution, then the insertion of provisions to guard the

rights of every class and person in that instrument was a vain and futile act. The effect of the execution of this ordinance in the manner indicated in the record would seem to be necessarily to close up the many Chinese laundries now existing, or compel their owners to pull down their present buildings and reconstruct of brick or stone, or to drive them outside the city and county of San Francisco to the adjoining counties beyond the convenient reach of customers, either of which results would be little short of absolute confiscation of the large amount of property shown to be now, and to have been for a long time, invested in these occupations. If this would not be depriving such parties of their property without due process of law it would be difficult to say what would effect that prohibited result.

The necessary tendency, if not the specific purpose, of this ordinance, and of enforcing it in the manner indicated in the record, is to drive out of business all the numerous small laundries, especially those owned by Chinese, and give a monopoly of the business to the large institutions established and carried on by means of large associated Caucasian capital.

If the facts appearing on the face of the ordinance, on the petition and return, and admitted in the case and shown by the no-
68 torious public and municipal history of the times, indicate a purpose to drive out the Chinese laundrymen, and not merely to regulate the business for the public safety, does it not disclose a case of violation of the provisions of the Fourteenth Amendment to the National Constitution, and of the treaty between the United States and China in more than one particular?

Does not the petition and return as clearly as in the laundry case present a case within the purview of the observations of Mr. Justice Field quoted from that case? We are ourselves unable to distinguish this case in principle from the laundry case. If this means prohibition of the occupation and a destruction of the business and property of the Chinese laundrymen in San Francisco—as it seems to us this must be the effect of executing the ordinance—and not merely the proper regulation of the business, then there is discrimination and a violation of other highly important rights secured by the Fourteenth Amendment and the treaty.

That it does mean prohibition, as to the Chinese, it seems to us must be apparent to every citizen of San Francisco who has been here long enough to be familiar with the course of an active and aggressive branch of public opinion and of public notorious events. Can a court be blind to what must be necessarily known to every intelligent person in the State? See Ah Kow *v.* Nunan, 5 Saw., 560; Sparrow *v.* Strong, 3 Wall., 104; Brown *v.* Piper, 91 U. S., 42.

But the supreme court of the State, in the recent case of Yick Wo, 8 West Coast Rep., 548, has sustained this ordinance in all its parts, both as a valid ordinance under the State constitution and under the provisions of the Fourteenth Amendment, and the treaty with China. Although the court does not discuss fully the latter aspect of the case it announces its view to be that the points are covered by the principles declared in Barbier *v.* Connelly, 113 U. S., 27, and Soon Hing *v.* Crowley, *Id.*, 703. We are ourselves unable

to put the same construction on the rulings in those cases, or upon the effect of the principles announced. We have no reason to find fault with anything decided in those cases, as we understand them, but it does not appear to us that these cases go far enough to cover the points now raised. The question now decided does not appear to us to have been presented in either of the cases. Indeed, the writer of this opinion himself denied the writ of *habeas corpus* in Soon Hing *v.* Crowley, on the same grounds adopted by the supreme court on writ of error to this court. He did not consider that that case presented the same points decided in the laundry and Tom Tong cases. That ordinance reserved no arbitrary discretion to grant or refuse a permit. It provided for a license upon complying with prescribed conditions. Its validity was recognized, and we have never denied, and we do not now deny, the power of the board of supervisors to properly regulate, by reasonable conditions prescribed in advance, the carrying on of this or any other business in such a manner as to render it reasonably safe.

The case of Yick Wo was argued before the State supreme court, *in bank*, but the opinion was prepared by the commissioners,
69 and the case decided against the petitioner by *the court* for the reason stated in the opinion of the commissioners. It thus had the approval after full and solemn argument both of the full court, consisting of seven judges, and of the three commissioners. In view of this decision and of the views of the district judge of this district in Soon Hing's case, wherein we divided in opinion, we do not feel sufficient confidence in our own views in opposition to the apparent greater weight of judicial authority in this State to justify us in holding the ordinance to have been passed in contravention of the provisions of the Fourteenth Amendment and of our treaty with China, or in discharging the petitioner on that ground.

This court has no appellate power over the courts of the State, and the writ of *habeas corpus* cannot be used to perform the functions of a writ of error. (*Ex parte* Reed, 100 U. S., 23.) As to the question on *habeas corpus* there is only a concurrent jurisdiction with the State supreme court. The judgment of this court is no more binding on the State court than is that of the State court on this court. It is only a question as to how the judgment of a court of the dignity of the supreme court of California should be regarded and treated by an inferior court of the United States on a question fairly open to doubt until that doubt shall be resolved by a court whose decision is controlling and binding on both. Although the statute imposes upon us the duty, which we could not if we would escape, of investigating and deciding all cases wherein a party alleges himself to be imprisoned in violation of the Constitution, laws, and treaties of the United States, even where held in pursuance of a judgment of a State court, yet we do not conceive it to be our duty to overrule the action of the supreme court of the State unless it be upon the clearest and most indubitable grounds; and especially so since the act of last winter has given an appeal by means of which the party can have any question of difference between the local State and United States courts authoritatively determined by a tribunal to the decisions of which all must

yield obedience. Besides a writ of error lies to the State supreme court from the Supreme Court of the United States, and this is the regular mode appointed by law for a review by an appellate tribunal of the questions involved. This is a case, under the circumstances, peculiarly proper to be left to the final arbitrament of that tribunal. A conflict between the supreme court of the State and the United States circuit court in regard to a matter open to reasonable doubt, as this clearly is, over which they have concurrent original jurisdiction, would be very undesirable, and should be avoided when practicable, and especially so where the party can have any error of either court corrected in the ordinary and regular course of judicial proceedings on writ of error or appeal.

The prisoner will be remanded in deference to what appears to us to be the greater weight of judicial authority in this State, but if desired an appeal will be at once allowed, and it is to be hoped that both parties and the United States Supreme Court will co-operate to procure a speedy decision of a case that involves the interests—the all, we may say—of so large a number of Chinese residents, who have been for many years pursuing their peaceful and useful avocations in the laundry business in San Francisco without any serious injury to the city or its citizens, but to the great convenience of many. Let the writ be discharged and petitioner remanded.

(Endorsed:) Read in open court January 26, 1886. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

70 At a stated term, to wit, the November term, A. D. 1885, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Wednesday, the 27th day of January, in the year of our Lord one thousand eight hundred and eighty-six.

Present: Honorable Lorenzo Sawyer, circuit judge.

Order Allowing Appeal.

In the Matter of Wo Lee on *Habeas Corpus.* No. 3947.

And now at this day, on motion of L. H. Van Schaick, Esq., attorney for petitioner and appellant, it is ordered that an appeal to the Supreme Court of the United States from the decision of the U. S. circuit court of this district herein be, and the same is hereby, allowed, and that the said petitioner and appellant give a bond in the sum of two hundred dollars conditioned for his appear-
71 ance whenever required, and a bond in the sum of two hundred dollars conditioned for the payment of all costs and damages that may be recovered against him; and that a certified transcript of the petition, writ of *habeas corpus*, return thereto, stipulations, admissions, and other proceedings herein be forthwith transmitted to the Supreme Court of the United States.

72 *Bond on Appeal.*

Supreme Court of the United States.

WO LEE, Appellant,
vs.
PETER HOPKINS, Sheriff of the City and County of San Francisco, Appellee.

Know all men by these presents that we, Wo Lee, Yee Too, and Lee Toon, of the city and county of San Francisco, State of California, are held and firmly bound unto Peter Hopkins, of the city and county of San Francisco, State of California, in the sum of two hundred dollars, to be paid to the said Peter Hopkins, his executors or administrators; to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 29th day of January, 1886.

Whereas the above-named Wo Lee hath taken an appeal to
73 the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States, ninth circuit, district of California:

Now, therefore, the condition of this obligation is such that if the above-named Wo Lee shall prosecute his said appeal to effect, and answer all costs and damages if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and effect.

WO LEE. [SEAL.]
YEE TOO. [SEAL.]
LEE TOON. [SEAL.]

Sealed and delivered in the presence of—
L. S. B. SAWYER.

STATE OF CALIFORNIA,
City and County of San Francisco, } *ss:*

Yee Too and Lee Toon, being duly sworn, each for himself deposes and says that he is a resident of the city and county of San Francisco, in the State of California, and is worth the sum of two hundred dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

YEE TOO.
LEE TOON.

74 Subscribed and sworn to before me this 29 day of January, 1886.

L. S. B. SAWYER,
Com'r U. S. Cir't Court, Dist. Cal.

(Endorsed:) The form of the within bond and the sufficiency of the sureties therein is hereby approved. Dated January 29, 1886. (Signed) Lorenzo Sawyer. Filed Jan'y 29, 1886. L. S. B. Sawyer, clerk.

75 UNITED STATES OF AMERICA, } ss:
District of California, }

Be it remembered that on this 29th day of January, 1886, before me, the undersigned, a commissioner duly appointed by the circuit court of the United States, district of California, to take acknowledgment of bail and affidavits, etc., personally appeared Wo Lee, as principal, and Yee Too and Lee Toon, as sureties, and acknowledged themselves to owe and be indebted to the United States of America as follows—that is to say, in the sum of two hundred dollars each, to be levied of their goods and chattels, lands and tenements, and the — United States rendered, if default be made in the conditions following:

The conditions of this recognizance are such that whereas one Wo Lee has taken an appeal from the decision and order of the circuit court of the United States in and for the district of California to the Supreme Court of the United States; and whereas the said Wo Lee has been admitted to bail by said circuit court, pending the hearing of said appeal, in the sum of two hundred dollars:

Now, therefore, if the said Wo Lee shall personally appear before the said circuit court of the United States, in and for the district of California, at the court-room thereof, at San Francisco, Cal., as he may from time to time be by said circuit court required to appear, and render himself amenable to any and all lawful orders and process of said court, and not depart the said court without leave first obtained, and abide by the final order of said court in said matter to be made and entered, then this recognizance shall be void; otherwise to remain in full effect and virtue.

WO LEE. [SEAL.]
YEE TOO. [SEAL.]
LEE TOON. [SEAL.]

Acknowledged before me the day and year first above written.

L. S. B. SAWYER,
Commissioner U. S. Circuit Court, District of California.

76 DISTRICT OF CALIFORNIA, ss:

Yee Too and Lee Toon, being duly sworn, each for himself deposes and says that he is a householder in said district, and is worth the sum of two hundred dollars, exclusive of property exempt from execution and over and above all debts and liabilities.

YEE TOO.
LEE TOON.

Subscribed and sworn to before me this 29th day of January, A. D. 1886.

L. S. B. SAWYER,
Commissioner U. S. Circuit Court, District of California.

Yee Too; residence, 705 Dupont St.; Chinese merchandise.
Lee Toon; residence, 735 Washington street; business, Chinese merchandise.

(Endorsed:) No. 3947. Circuit court of the United States, district

of California. In the matter of Wo Lee on *habeas corpus*. Bond to appear, pending appeal, in the sum of $200, with Yee Too and Lee Toon as sureties. Filed this 29th day of Jan'y, 1886. L. S. B. Sawyer, clerk.

The form of the foregoing bond and the sufficiency of the sureties thereon are hereby approved.

(Signed) LORENZO SAWYER,
Circuit Judge.

77 In the Circuit Court of the United States for the District of California.

In the Matter of the Application of Wo Lee for a Writ of *Habeas Corpus*. No. 3947.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing seventy-six written and printed pages, numbered from 1 to 76, inclusive, to be a full, true, and correct copy of the record and of all proceedings in the above and therein entitled matter, and that the same together constitute the transcript on appeal to the Supreme Court of the United States in said matter.

Attest my hand and the seal of said circuit court this thirteenth day of February, A. D. 1886.

[The seal of the Circuit Court, District of Cal'a.]

L. S. B. SAWYER, *Clerk.*

78 UNITED STATES OF AMERICA, *ss:*

To Peter Hopkins, sheriff of the city and county of San Francisco, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 11th day of October, A. D. 1886, pursuant to an order allowing an appeal from the judgment of the circuit court of the United States of America for the district of California, entered January 26, 1886, in the matter of the application of Wo Lee for a writ of *habeas corpus*, to show cause, if any there be, why the judgment herein mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, this 29th day of January, A. D. 1886, and of the Independence of the United States the one hundred and tenth.

[The Seal of the Circuit Court, District of Cala.]

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

79 Service of the within citation is hereby admitted this 30th day of January, 1886.

PETER HOPKINS, *Sheriff*,
By JERE J. DRISCOLL,
Under Sheriff.
ALFRED CLARKE,
Special Counsel for the Municipality of San Francisco.

[Endorsed:] No. 3947. In the Supreme Court of the United States. In the matter of Wo Lee for a writ of *habeas corpus*. Citation. Filed February 1, 1886. L. S. B. Sawyer, clerk U. S. circuit court, district of California, by F. D. Moncton, deputy clerk.

Endorsed on cover: California, C. C. U. S. No. 1281. Wo Lee, appellant, *vs.* Peter Hopkins, sheriff of the city & county of San Francisco. Filed March 5, 1886.

79 Service of the within citation is hereby admitted this 30th day of January, 1886.

PETER HOPKINS, *Sheriff*,
By JERE J. DRISCOLL,
Under Sheriff.
ALFRED CLARKE,
Special Counsel for the Municipality of San Francisco.

[Endorsed:] No. 3947. In the Supreme Court of the United States. In the matter of Wo Lee for a writ of *habeas corpus*. Citation. Filed February 1, 1886. L. S. B. Sawyer, clerk U. S. circuit court, district of California, by F. D. Moncton, deputy clerk.

Endorsed on cover: California, C. C. U. S. No. 1281. Wo Lee, appellant, *vs.* Peter Hopkins, sheriff of the city & county of San Francisco. Filed March 5, 1886.

Office Supreme Court U. S.
FILED.
APR 7 1886
JAMES H. McKENNEY.
CLERK.

118-356

Supreme Court of the United States.

YICK WO, *Plaintiff in Error*,

vs.

PETER HOPKINS, SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, *Defendant in Error.*

No. 1280. Habeas Corpus. Writ of Error to the Supreme Court of California.

WO LEE, *Appellant*,

vs.

PETER HOPKINS, SHERIFF OF THE CITY AND COUNTY OF FAN FRANCISCO, *Appellee.*

No. 1281. Habeas Corpus. Appeal from the Circuit Court of the U. S. for California.

ARGUMENT OF HALL MCALLISTER, L. H. VAN SHAICK AND D. L. SMOOT,

FOR APPELLANT AND PLAINTIFF IN ERROR.

IN THE

Supreme Court of the United States.

YICK WO, *Plaintiff in Error*,

vs.

PETER HOPKINS, SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, *Defendant in Error.*

No. 1280. Habeas Corpus. Writ of Error to the Supreme Court of California.

WO LEE, *Appellant*,

vs.

PETER HOPKINS, SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO, *Appellee.*

No. 1281. Habeas Corpus. Appeal from the Circuit Court of the U. S. for California.

I.

By written agreement of counsel and the permission of the court, these cases are heard together, because they involve the same questions.

The petition of Yick Wo was filed in the supreme court of California and that of Wo Lee in the United States circuit court for California, the two petitions presenting substantially the same state of facts and raising the same questions of law.

The decision of the circuit court followed that of the supreme court of California, and is adverse to the petitioner and adverse to Judge Sawyer's impressions and most excellent reasoning through sheer deference to the supreme court of California.

The case of Yick Wo having been presented on printed argu-

ments was referred by the supreme court of California to the appeals commission for consideration and opinion. The opinion of the commission as shown by the record (folios 28 to 53) was adverse to the petitioner, and the supreme court of California adopted the result in the following language :

" For the reasons given in the foregoing opinion the petitioner is " remanded to the custody of the sheriff."

It is to be remarked just here that the supreme court of California rests its adoption of this result upon the reasons given in the opinion and that the opinion itself at folios 50 and 51, expressly declares that the matter of discrimination, which is the principal question in these cases, was not discussed by the commission at all, that body having reached the erroneous conclusion that the cases of Barbier *vs.* Connolly, 113 U. S., 27, and Soon Hing *vs.* Crowley, *idem* 703, establish the proposition that hostile legislation may be so ingeniously framed and executed as to defeat the constitutional and treaty guarantees upon which the petitioners rely, without the possibility of redress through the judicial branch of the government.

As the supreme court of California rests it judgment upon the opinion of the commission, and as the commission have waived the question of discrimination, under a misapprehension of Barbier *vs.* Connolly and Soon Hing *vs.* Crowley, we can very reasonably suggest that *quoad* the principal question in the cases at bar there has been decision without consideration.

The records in these cases show that of the 320 laundries in the city and county of San Francisco about 240 are owned and conducted by subjects of China, and that of the 320 laundries about 310 are built of wood, the same material of which nine-tenths of the houses in San Francisco are constructed. That the capital thus invested by subjects of China is not less than two hundred thousand dollars, and that their annual expenditure for rent, license, taxes, gas and water is about one hundred and eighty thousand dollars. That the petitioners and two hundred of their countrymen similarly situated and engaged who had paid their license taxes and complied with every sanitary and fire regulation applied to the board of supervisors—the city and county legislature—for permission to continue their business in the frame buildings which they had thus occupied for years. That not one of the applications was granted though couched in the most respectful language. That eighty odd other persons, who were not subjects of China, and who were engaged in the same business under similar conditions, made similar applications and every one of the applications was granted except one. That the same body which prohibited laundrying in frame buildings reserved to itself the right of arbitrarily suspending the inhibition upon special application. That for no legitimate reason this body by its action has declared that it is lawful for eighty-odd persons who are not subjects of China to wash clothes for hire in frame buildings, but

unlawful for the petitioners and all other subjects of China to do the same thing. That the ordinance in question prescribes no terms by a compliance with which the supervisoral consent may be demanded, but leaves the applicant and his business at the mercy and unregulated caprice of less than twelve men.

The petitions, returns and admissions in these cases are identical, *mutatis mutandis*, and we respectfully refer to them as our authority for the above, and other facts.

The admissions in the Yick Wo case commence at folio 72, and in the Wo Lee case at folio 49.

The assignments of error in these cases are the same, and they may be found at page 33 of the record in one case and page 1 of the record in the other case.

II.

The first assignment of error takes the position that the occupation in question is necessary and harmless, and that it is against natural right to make its exercise dependent upon the arbitrary will of the Board of Supervisors. In other words the present social structure, whether regarded as the result of necessity or compact, does not require or contemplate that the exercise of a natural, necessary and harmless right shall hinge upon the unexpressed, absolute and capricious will of any small number of men. If this ordinance prescribed reasonable or possible terms upon which the supervisoral consent might be demanded then this point could not be urged. But it does not. He who would wash clothes for hire in a frame building anywhere within the broad limits of San Francisco county must, without light, court the smiles of caprice and grapple prejudice.

The petitioners were charged with and convicted of violating section 1 of Order 1569 and section 68 of Order 1587. *The two sections are precisely alike.* Each section reads:

"It shall be unlawful from and after the passage of this order for "any person or persons to establish, maintain or carry on a laundry "within the corporate limits of the city and county of San Francisco, "without having first obtained the consent of the Board of Supervisors, "except the same be located in a building constructed either of brick or "stone."

Our proposition under the first assignment of error is that this section is to be read, as if it concluded in the following manner, viz:

"Notwithstanding this sweeping prohibition, clothes washing for hire "may be carried on in houses not made of brick or stone; but when, "where, by whom and under what conditions, we do not choose to "make known."

That this might be lawful with reference to occupations which are harmful and wrong *per se* we do not now deny; but we do maintain that it is otherwise when it comes to a business which in itself is right, necessary and harmless.

III.

The second assignment of error takes the position that the ordinance is a legislative condemnation to heavy pains and penalties of all persons who wash clothes for hire in frame buildings, whether amounting to a nuisance or not, contrary to sub. 3, sec. 9, art. 1 of the U. S. Constitution, prohibiting bills of attainder.

The punishment in these cases can extend to an imprisonment of six months and a fine of one thousand dollars. No matter how remote from human habitations and highways; no matter how inoffensive, harmless and necessary; no matter how clean, secure and well regulated, if the laundry be constructed of anything other than brick or stone the trial court, under this law, is bound to treat it as a nuisance and condemn the owner to the penalties demanded by the Order. If the house were constructed of iron, asbestos, glass, clay or incombustible concrete, and the business never so well conducted the result would be the same, and we would have the destruction of business and property rights, the forfeiture of money and the sacrifice of liberty for no higher reason than that these subordinate lawmakers have seen fit to declare unlawful a thing which hurts no one, which benefits many and which for the purposes of oppression, rather than good government, they have placed on the plane of nuisance and thus taken from the courts the right to inquire and determine whether it really constitutes a nuisance or not.

In speaking about the power to prevent and abate nuisances, Mr. Dillon, in his work on Municipal Corporations, says:—

Vol. 1, sec. 374: "This authority may be constitutionally conferred on the incorporated place, and it authorizes its council to act against that which comes within the *legal motion of a nuisance;* but such power conferred in general terms, *cannot be taken to authorize the extra judicial condemnation and destruction of that as a unisance which in its nature, situation or use is not such.*"

In Yates *vs.* Milwaukee 10 Wall. 497, Mr. Justice Miller said: "The mere declaration by the City Council that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance *unless it in fact had that character.*"

If the Board of Supervisors had no authority to make this enlargement of the law of nuisance then the petitioners have been exposed to pains and penalties in violation of the constitution; for the Board, and

not the courts, have ascertained and declared as existent the principal fact upon which the convictions rest.

It does seem that a great deal which occurs in

Cummings *vs.* Missouri, 4 Wall. 277 and

Exparte Garland, 4 Wall. 333 is germaine to this proposition.

IV.

The third assignment of error takes the position that the immediate effect of the ordinance is to deprive the petitioners, and others similarly situated, of their property, and property rights, without due process of law.

If it be true that this system amounts to an enlargement of the law of nuisance, and that such a result is *ultra vires* the Board of Supervisors, then there has been a deprivation of property and property rights without due process of law, because the indispensable fact of nuisance has been ascertained and declared by the Board of Supervisors instead of the tribunals of law. The judgment, for instance, instead of ascertaining and declaring that a nuisance exists, simply ascertained and declared that clothes washing for hire was carried on in a building not made of brick or stone and that the Board had not consented thereto—and then came the punishment without reference to the question of nuisance.

V.

The fourth and fifth assignments of error take the position that the said ordinance is capable of being and is so operated and enforced as to discriminate against the petitioners and all other subjects of China, similarly conditioned, contrary to sec. 1 of the 14th amendment, secs. 1977 and 9 U. S. Rev. Stats. and arts. V and VI of the treaty of 1868, and arts. II and III of the treaty of 1881 between the United States and China.

The record discloses, that of the 320 laundries in San Francisco, about 310 are constructed of wood, and about 240 of the 320 are owned and conducted by subjects of China. The record also shows that the petitioner, and about 200 of his countrymen, similarly situated, applied to the Board of Supervisors for permission to continue their clothes washing business in the frame buildings which they have been occupying and using for many years.

The record also shows that not a single one of the petitions presented by subjects of China has been granted, and only one of the petitions presented by the eighty who are not subjects of China has been re-

fused. As a frank people, we cannot afford to disguise the fact that this record presents a case of practical discrimination of the rankest character.

No subject of China is permitted to wash clothes for hire in a house not made of brick or stone; while every one of the eighty odd who are not subjects of China, are, with one lonely exception, permitted to do this identical thing, and pocket the increased profits thereof. No touches of rhetoric could make this matter stronger than these facts present it. If this be a lawful result then, indeed, are constitutional guarantees and treaty stipulations weaker, as barriers, than the paper upon which they are inscribed.

The Declaration of Independence says:

"We hold these truths to be self-evident: that all men are created "equal; that they are endowed by their Creator with certain inalienable "rights; that among these are life, liberty, and the pursuit of happi- "ness."

The Fourteenth Amendment of the Federal Constitution says:

"Nor shall any State deprive any *person* of life, liberty, or property, "without due process of law; nor deny to any *person* within its juris- "diction the equal protection of the laws."

Section 1977 of the U. S. Revised Statutes says:

"All *persons* within the jurisdiction of the United States shall have "the same right in every State and Territory to make and enforce con- "tracts, to sue, be parties, give evidence, and to the full and equal bene- "fit of all laws and proceedings for the security of persons and property "as is enjoyed by *white citizens*, and shall be subject to like punishment, "pains, penalties, taxes, licenses and exactions of every kind, *and to no* "*other*."

Section 1979 of the U. S. Revised Statutes says:

"Every person who under color of any statute, ordinance, regulation "custom, or usage of any State or Territory, subjects, or causes to be "subjected any citizen of the United States or *other person* within the "jurisdiction thereof to the deprivation of any rights, privileges, or im- "munities secured by the Constitution and laws, shall be liable to the "party injured in an action at law, suit in equity or other proper proceed "ing for redress."

Section 1 of Article I of the California Constitution says:

"All men are by nature free and independent, and have certain in- "alienable rights, among which are those of enjoying and defending life "and liberty; acquiring, possessing and protecting property, and pur- "suing and obtaining safety and happiness."

Article V of the treaty of 1868 says:

"The United States of America and the Emperor of China cordially "recognize the *inherent and inalienable right of man* to change his home "and allegiance, and also the mutual advantage of the free migration and "emigration of their citizens and subjects, respectively, from the one "country to the other for purposes of curiosity, *of trade, or as permanent "residents.*"

Article VI of this treaty says:

"Citizens of the United States visiting or residing in China shall enjoy "the same privileges, immunities or exemptions in respect to travel or "residence as may there be enjoyed by the citizens or subjects of the most "favored nation, *and, reciprocally, Chinese subjects visiting or* RESIDING *in "the United States* SHALL *enjoy the same privileges, immunities and exemp-"tions in respect to travel or* RESIDENCE *as may there be enjoyed by the "citizens or subjects of the most favored nations.* But nothing herein con-"tained shall be held to confer naturalization upon citizens of the United "States in China, nor upon the subjects of China in the United States."

Article II of the treaty of 1881 says:

"Chinese subjects, whether proceeding to the United States as teach-"ers, students, merchants, or from curiosity, together with their body "and household servants, and Chinese laborers who are now in the "United States, shall be allowed to go and come of their own free will "and accord, *and* SHALL *be accorded all the rights, privileges, immunities "and exemptions which are accorded to the citizens and subjects of the most "favored nations.*"

Art. III of this last treaty says:

"If Chinese laborers, or Chinese of any other class, now either per-"manently or temporarily residing in the territory of the United "States, meet with ill treatment at the hands of any other persons, the "Government of the United States will exert all its power to devise "measures for their protection, and *to secure to them the same rights, priv-"ileges, immunities and exemptions as may be* ENJOYED *by the citizens or "subjects of the most favored nation, and to which they are entitled by "treaty.*"

From the lofty summit of this great pyramid of elevated sentiment and sovereign pledges, we must scan with unobstructed vision the act in question and its operations—remembering always that the body which passed the law is the same that operates it so as to produce discrimination.

We maintain that every resolution granting or refusing a permit, is a *quasi*, or occult proviso, attaching itself to Section 68 by operation or effect of law; and that the sum of these resolutions show an unbroken

course of discrimination, and a wanton disregard of the highest laws of the land.

This is not the case of a valid or constitutional law enforced or administered in an unconstitutional manner. It is a law of unfinished growth, and stands as if it read: "Clothes washing for hire, in buildings not "made of brick or stone, is prohibited; but this law is not to be enforced "against those who, from time to time, we, the law-makers, shall except "from its operation." With such a measure, providing in terms for the insertion of illimitable provisos and exceptions, it is not only the privilege, but it would seem to be the duty, of the courts to scrutinize its operations closely, and declare the Act itself a nullity, because it establishes a system by which forbidden results can be and are accomplished without any possible redress to the persons aggrieved.

It is the same as if Sec. 68 now read:

"Clothes-washing for hire in houses not made of brick or stone "is permitted as to the eighty odd who are not subjects of China, "and prohibited as to the two hundred who are subjects of China."

Paraphrasing this section once more, it is the same as if it read:

"Clothes washing for hire in houses not made of brick or stone is "prohibited as to the subjects of China."

If sec. 68 was in the language of any one of these three paraphrases there would be, we suppose, no hesitation as to what the judgment of the law should be, and, since the *effect* of the measure is just what these paraphrases import, why should not the judgment be the same?

In re Quong Woo, 9 Pacific C. L. J., at page 819, the circuit court of the United States for California uses this language:

"The petitioner is an alien, and under the treaty with China is enti-"tled to all the rights, privileges and immunities of subjects of the "most favored nation with which this country has treaty relations. "Being a resident here before the passage of the recent act of Congress, "restricting the immigration of subjects of his country, he has, under "the pledge of the nation, the right to remain and follow any of the "lawful, ordinary trades and pursuits of life, without let or hindrance "from the State, or any of its subordinate municipal bodies, except "such as may arise from the enforcement of *equal and impartial* "*laws*. His liberty to follow any such occupation cannot be re-"strained by invalid legislation of any kind—certainly not by a mu-"nicipal ordinance that has no stronger ground for its enactment than "the *miserable pretense* that the business of a laundry—that is, of "washing clothes for hire—is against good morals or dangerous to the "public safety."

In re Tiburcio Parrott, 6 Sawyer, 349, Mr. Justice Field, with reference to the validity of a law presented for determination, said:

"In considering this question, we are at liberty to look not merely "to the language of the law, but to its *effect* and *purpose*. * * If "the *effect* and *purpose* of the law be to accomplish an unconstitutional "object, the fact that it is passed in the pretended exercise of the police "power * * * will not save it."

Again he said:

"Its practical *operation* and *effect* must, therefore, be adverted to."

Judge Sawyer, in the same case, said:

"The right to labor is, of all others, after the right to live, the "fundamental, inalienable right of man wherever he may be per- "mitted to be of which he cannot be deprived, either under the "guise of law or otherwise, except by usurpation and force. * * "And this absolute, fundamental, natural right was guaranteed by the "National Government to all Chinese who were permitted to come into "the United States under the treaty with their government."

Again he says:

"The end sought to be attained is unlawful. It is in direct violation "of our treaty stipulations and the constitution of the United States. "The end being unlawful, * * * it is equally unlawful * * * "to use any means, however proper or within the power of the State "for lawful purposes for the attainment of that unlawful end. * * "It cannot be otherwise than unlawful to use any means whatever to "accomplish an unlawful purpose."

Again he says:

"The object * * * to be accomplished * * * is manifestly "to restrict the right of the Chinese residents to labor, and thereby "deprive them of the means of living in order to drive those now here "from the State. * * This abridges their privileges and immunities, "and deprives them of the equal protection of the laws, in direct viola- "tion of the treaty and constitution—the supreme law of the land."

The judge then directs attention to the cunning means "admirably adapted to the end proposed."

In Henderson *vs.* Mayor, etc., 92 U. S. R., 268, the court said:

"In whatever language a statute may be framed, its purpose may be "determined by its natural and reasonable effect."

In Cummings *vs.* Missouri, 4 Wall., 320, the court said:

"If that which cannot be accomplished by means looking directly to "the end, can be accomplished by indirect means, the inhibition may be

evaded at pleasure. No kind of oppression can be named against "which the framers of the constitution intended to guard, which may "not be effected."

In Chuy Lung *vs.* Freeman, 92 U. S. R., 279, the court said:

"If, as we have endeavored to show, in the opinion in the preceding "cases, we are at liberty to look to the *effect* of a statute for the test of "its constitutionality, the argument need go no further."

In Strauder *vs.* West Virginia, 100 U. S. R., 303, it was held, at the instance of Strauder, a man of color, that the jury law of West Virginia was against the Fourteenth Amendment, and void, beeause it allowed white persons only to sit as jurors.

The court considered it an injurious discrimination against the colored people to exclude them as a class from this station of duty, and a wrong to the accused to deprive him of the possibility of having some of his own race on the jury that should try him.

In *ex parte* Virginia, 100 U. S. R., 339, the court held that it was contrary to the Fourteenth Amendment for Judge C. D. Coles, of the county court of Pittsylvania county, Va., to ignore colored persons in selecting a jury under the State law, which did not in terms or spirit discriminate against colored people, but made discrimination possible by leaving the selection of the grand and petit jurors to the county judges. At page 347 the court says:

"A State acts by its legislative, its executive or judicial authorities. "It can act in no other way. The constitutional provision, therefore, "must mean that no agency of the State, or of the officers or agents "by whom its powers are exerted, shall deny to any person within its "jurisdiction the equal protection of the laws. Whoever by virtue of "public position under a State government deprives another of prop-"erty, life or liberty, without due process of law, or denies or takes "away the equal protection of the laws, violates the constitutional in-"hibition, and as he acts in the name of and for the State, and is clothed "with the State's power, his act is that of the State. This must be so "or the constitutional prohibition has no meaning. Then the State "has clothed one of its agents with power to annul or evade it."

In Neale *vs.* Delaware, 103 U. S. R., 370, where the discrimination lay in the execution of the law and not in the law itself the decision was the same in *ex parte* Virginia.

Bush *vs.* Kentucky, 107 U. S. R., 110, bears upon the same proposition.

In Barbier *vs.* Connolly, 113 U. S. R., 27, the court said:

"There is no invidious discrimination against any one within the "prescribed limits by such regulations. * * All persons engaged

" in the same business within it are treated alike; are subject to the " same restrictions are entitled to the same privileges under similar con- " ditions. * * The Fourteenth Amendment * * undoubtedly " intended * * that equal protection and security should be given " to all under like circumstances, in the enjoyment of their personal " and civil rights; * * that no impediment should be interposed to " the pursuits of any one except as applied to the same pursuits by " others under like circumstances; that no greater burdens should be " laid upon one than are laid upon others in the same calling and con- " dition. * * Class legislation discriminating against some and fa- " voring others is prohibited. * * In the execution of admitted, " powers necessary proceedings are often required which are cumber- " some, dilatory and expensive, yet, if no discrimination against any " one be made, and no substantial right be impaired by them, they are " not obnoxious to any constitutional objection."

In Soon Hing *vs.* Crowley, 113 U. S. R., 703, speaking of the ordinance prescribing the hours of labor in laundries, the court said:

" Their regulations in this matter are not subject to any interference " by the federal tribunals unless they are made the occasion for invading " the substantial rights of persons, and no such invasion is caused by " the regulation in question. * * No invidious discrimination is " made against any one by the measures adopted. All persons engaged " in the same business within the prescribed limits are treated alike, and " subject to similar restrictions. * * The discriminations which are " open to objection are those where persons engaged in the same busi- " ness are subjected to different restrictions, or are held entitled to differ- " ent privileges under the same conditions. It is only then that the dis- " crimination can be said to impair that equal right which all can claim " in the enforcement of the laws. * * And the rule is general with " reference to enactments of all legislative bodies that the courts cannot " inquire into the motives of the legislators in passing them, except as " they may be disclosed on the face of the acts, or *inferable from their* " *operation*, considered with reference to the condition of the country " and existing legislation. The motives of the legislators, considered " as the purposes they had in view, will always be presumed to be to " accomplish that which follows, as the natural and reasonable effect of " their enactments. * * And in the present case, even if the motives " of the supervisors were as alleged, the ordinance would not be thereby " changed from a legitimate police regulation, *unless in its enforcement* " it is made to operate only against the class mentioned, and of this " there is no pretense."

We have thus quoted liberally from Barbier *vs.* Connelly and Soon Hing *vs.* Crowley, because the respondent relies on them in his brief, and because the language of the court in those cases so pointedly sustains our position that the case at bar presents an instance of that sort

of discrimination which the supreme law was intended to prevent, and which it will not permit—no matter how accomplished.

In *ex parte* Moynier, 1 W. C. R., 782, no actual discrimination was shown. If there had have been, it is certain that the Supreme Court in California would have taken the same view of the matter as the Supreme Court at Washington, because at page 783, the court uses this language: "The order is not discriminating and special, in any such sense as to "make it repugnant to the constitution."

In Mayor of Baltimore *vs.* Radiche, 49 Md., 217, there is so much in the facts of the case similar to the facts at bar, and so much in the opinion of the court supportive of some of the positions taken in behalf of the petitioners, that we refer to it as an authority in point. Speaking of the ordinance involved in that case the court among other things said: "*It lays down no rules by which its impartial execution can be se-*" *cured or partiality and oppression prevented.*"

In *Ex parte* Frank, 52 Cal., 610, in speaking of the "Sample Sellers Ordinance" of San Francisco the Supreme Court of California said: "*It* " *is flagrantly unjust, oppressive, unequal and partial.*"

The ordinance in question, like the panther's foot, looks harmless in repose, but not so in action.

In the Railroad Commission cases, 116 U. S., 307, it was resolved that though an act might in terms be unobjectionable, yet if its execution ran against constitutional rights the court would feel compelled to interpose. At page 335 the court said: "There is much they [the " Commission] may do in regulating charges within the State, which " will not be in conflict with the Constitution of the United States. It " is to be presumed they will always act within the limits of their con-" stitutional authority. It will be time enough to consider what may " be done to prevent it when they attempt to go beyond."

In the cases at bar the Board of Supervisors, who practically and really executed their own order, have gone beyond the constitutional limits and the petitioners pray the court to interpose for their relief.

At page 336 the court also said: "In its general scope it is constitu-" tional and it applies equally to all persons or corporations owning or " operating railroads in the State. *No preference is given to one over* " *another, but all are treated alike.* Whether in some of its details the " statute may be defective or invalid we do not deem it necessary to " inquire, for this suit is brought to prevent the commissioners from " giving it any effect whatever as against this company. * * * * " *Many questions may arise under it not necessary to be disposed of now,* " *and we leave them for consideration when presented.* * * * * * " When the Commission has acted and proceedings are had to enforce

"that it has done, questions may arise as to the validity of some of the "various provisions which will be worthy of consideration."

The ordinance in question was passed fully six years ago, though no action was taken under it until 1885; and the conditions contemplated by the above extracts have arisen in the cases at bar, and they are presented in the full assurance that the ingenuity of human hostility will not be allowed to triumph over and destroy the natural and conventional rights entrusted to and sacredly sheltered by the sword of justice.

We respectfully refer also to *Exparte* Tie Soy 9 West Coast Reporter 387 and Judge Sawyer's opinion in the record of Wo Lee *vs.* Hopkins as most able and conclusive arguments in favor of discharging these men from punishments which stand as super-added wrongs to the greater wrong of discrimination.

Respectfully submitted,

HALL McALLISTER,
L. H. VAN SCHAICK,
D. L. SMOOT,
Counsel for Yick Wo and Wo Lee.

WASHINGTON, D. C., April 6, 1886.

118-356

Office Supreme Court U. S.
FILED
APR 12 1886
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

October term, 1885.

YICK WO, plaintiff in error,
v.
HOPKINS, sheriff. } 1280.

In error to the supreme court of California.

WO LEE, appellant,
v.
HOPKINS, sheriff. } 1281.

On appeal from circuit court, ninth circuit, district of California.

Authorities and argument for defendant and respondent.

ALFRED CLARKE,
H. G. SIEBERST,
Counsel for defendant and respondent.

L. H. VAN SCHAICK,
HALL McALLISTER,
D. L. SMOOT,
Counsel for plaintiff and appellant.

INDEX.

CONTENTS OF BRIEF FOR DEFENDANT AND RESPONDENT.

ANALYTICAL INDEX.

PAGE

Points and authorities for defendant and respondent 1
Introductory statement 2, 3, 4, 9, 20, 26, 27, 28
Decision of superior court sustaining order 1569 .... 5, 6, 7, 8
Quotation from brief in court below,
10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22,
23, 24, 25, 97, 98, 99, 100, 101, 102, 103, 104
Statement of law 29
Conflicting decisions 30, 42
Report of judiciary committee, H. R 31, 32
Police power considered 33, 34, 35, 36
The errors assigned 37
Argument 38, 41
Assignment of errors examined 39, 40
Iowa asserts her police power 43, 44
Georgia asserts her police power 45
New Jersey asserts her police power 46, 48
State *v.* court, etc., November, 1872. 7 Vroom, 72 .... 47, 49
Indiana asserts her police power 50, 52, 54, 56, 58
Groesch *v.* the state, May, 1873. 42 Ind., 547 .. 51, 53, 55, 57, 59
Wisconsin asserts her police power 60, 62, 64
State, etc., *v.* Ludington et al., June, 1873. 33 Wis., 107 .... 61, 63
Mississippi asserts her police power 65, 66, 68
Rohrbacher *v.* Jackson, Oct., 1875. 51 Miss., 741 67
Kansas asserts her police power 69, 70
Eureka *v.* Davis, Jan., 1879. 21 Kan., 579 71
Nebraska asserts her police power 72, 74
Pleuler *v.* state, July, 1881. 11 Neb., 547 .... 73, 75
Florida asserts her police power 76, 78, 80, 82, 84
State *v.* Brown, Jan., 1882. 10 Fla., 564 .... 77, 79, 81, 83
Minnesota asserts her police power 85
Massachusetts asserts her police power 86
California asserts her police power 87, 88

ANALYTICAL INDEX.

PAGE

Re Yick Wo, the case at bar.....89, 91
Findings of the court below.....90, 92
The Yick Wo and Wo Lee decisions compared.....93, 94, 95, 96
Controversy in court below.....97
Review of plaintiff's points and authorities.....105, 109
Conclusion.....111

SYNTHETICAL INDEX.

Introductory Statement.....1–28
Order 1559.....2, 10, 13, 28
Decision sustaining order 1559, *re* White, 6 W. C. R., 644,
2, 5, 9, 13, 17, 19, 29, 98, 10, 100, 103, 104
Order 1569.....3, 5, 10, 13, 26, 27, 89, 90, 92, 94, 98, 100,
9, 15, 29, 35, 36, 88, 42, 28, 30, 36
Decision against order 1569, People *v.* Ah Ling, May 7, 1881,
3, 4, 18, 28, 100
Order 1679—Held invalid, *re* Quong Wo, 7 Saw., 526,
4, 10, 20, 28, 30, 39, 42, 92, 94, 99, 100, 102, 106
Order 1691—Tom Tong, 108 U. S. R., 558...4, 9, 10, 18, 28, 92, 94, 100
Hung Hang, id., May 7, 1883.....4, 9, 18
Order 1719—Soon Hing *v.* Crowley, 113 U. S. R., 703,
4, 7, 10, 14, 17, 18, 19, 28, 29, 34, 35,
88, 20, 92, 95, 97, 99, 100, 101, 108
Re Moynier, 65 Cal., 33..4, 8, 14, 19, 27, 28, 29, 34, 87, 92, 101, 104
Re Soon Hing, supreme court in bank, March 13, 1884,
4, 7, 10, 14, 17, 28, 29, 34, 35, 88, 101, 104
Held invalid, *re* Woo Yeck, 12 P. C. L. J., 384,
4, 18, 27, 28, 29, 7, 10, 14, 17, 19, 34, 35, 88, 100
Decision superior court of San Francisco.....5, 9
Stat. Cal., 1861, p. 544, May 18, 1861.....6
Barbier *v.* Connolly, 113 U. S. R., 27,
7, 14, 17, 28, 29, 35, 87, 34, 92, 95, 101, 104, 108
Ex parte Shrader, 33 Cal., 297.....7
Ex parte Andrews, 18 Cal., 678.....8
Brooks *v.* Hyde, 37 Cal., 366.....8
Bourland *v.* Hildreth, 26 Cal., 161.....8
Ex parte Keating, 38 Cal., 702.....8
Smith *v.* Judge, etc., 17 Cal., 554.....8
French *v.* Teschemacher, 24 Cal., 544.....8
§ 21, art. 1, state cons.....8
Commonwealth *v.* Alger, 7 Cush., 85.....8, 66, 69
Yick Wo, 8 W. C. R., 548,
9, 15, 29, 35, 36, 42, 88, 93, 94, 95, 97, 101, 105, 106, 108

PAGE

Wo Lee, 9 W. C. R., 81–5,
9, 29, 30, 36, 10, 20, 28, 39, 42, 93, 94, 95, 96, 106
Facts and law not separately stated, § 633, C. C. P.....9
Admissions of respondent.....10, 11
Passage of orders 697, 1098, 1135, 1264, 1429, 1547, 1559, 1569, 1587, 1679, 1691, 1719, 1746, 1762 and 1767.....10
Quotation from brief in court below.....11
§ 1484, P. C. of Cal.....11, 105
§ 760, rev. stat. U. S.....11, 105
Stout *v.* Coffin, 28 Cal., 65.....12
Tomlinson *v.* Monroe, 41 Cal., 91.....12
Rowan *v.* Bowles, 21 Ill., 17.....12
Tucker *v.* Parks, 7 Colo., 62–8.....12
§ 1868, C. C. P.....12
§ 74, consolidation act, and stat. 1861, p. 544.....13, 89
Re Westerfield, 55 Cal., 550.....14, 19
§ 11, art. XI, Cal. const.....14, 15, 89, 96, 101
Re Chin Yan, 60 Cal., 81.....14, 34, 87
Re Ah Toy, 62 Cal., 92.....14
Re Casinello, 62 Cal., 540.....14
Re Ah Sing, 59 Cal., 404.....14, 34
Los Angeles *v.* S. P. R. R. Co., 61 Cal., 59.....14
Re Stuart, 61 Cal., 375.....14, 34
Re Beninger, 64 Cal., 291.....14
Marini *v.* Graham, 6 W. C. R., 766.....14, 17, 99
Re Wolters, 65 Cal., 269.....14, 34, 92
People *v.* Dwyer, 3 W. C. R., 438.....14
Re Mount, 5 W. C. R., 575.....14, 34, 92
Portland *v.* Schmidt, 6 W. C. R., 40.....14
Re Li Protti, 8 W. C. R. 812.....15, 29, 31, 35, 42
§ 25, art. IV, Cal. const.....15, 34
Stat. 1861, p. 412.....15
Hall *v.* board of supervisors, 20 Cal., 591.....15, 16
People *v.* Marx, 99 N. Y., 377.....15, 17, 34
6 crim. law mag., 730–9; 2 N. E. R., 29.....15, 17, 34
Stat. 1885, p. 45.....16
Live stock association *v.* Crescent City, 1 Abbott U. S. C. C., 398..17
Corfield *v.* Coryell, 4 Wash. C. C., 381.....17
Slaughter house cases, 16 Wall., 62.....17, 34
People *v.* Cipperly, 4 N. E. R., 109.....17, 35
Re Delaney, 43 Cal., 479.....17, 35, 102
Tung Hing Tong association.....17, 18, 19, 27, 28, 99

PAGE

Works without intermission, 13th amdt. U. S. const.....18
38 Cal., 325.....19
Decision of superior court in case of C. J. J. Smith *v.* Jas. Ryan, status of.....21, 27
What the evidence shows.....21
Hopkins *v.* W. P. R. R. Co., 50 Cal., 190.....21
The law of the case.....22
What is nuisance.....22
Davis *v.* Sawyer, 15 cen. law jour., 251.....22
Nuisance of an aggravated character.....23
Wood on nuisances, p. 541.....23
Protracted noises at night.....23
Injunction and fine.....23
Dolliver *v.* Ah Wing et als., Jan. 25, 1886.....24, 27
Fire insurance in San Francisco.....25
§ 69, order 1587.....26, 27
§ 68, order 1587.....27, 28, 89, 98, 100
Tung Hing Tong resisted every laundry order.....28
Review of authorities.....28
Statement of law.....29
Re Guerrero, March 16, 1886, 9 W. C. R., 862.....29, 31, 42, 87
Re Hang Kie, March 23, 1886, 10 W. C. R., 52.....88, 96, 106
Conflicting decisions.....30
Wong Yung Quy, Feb. 5, 1880, 6 Saw., 237.....30, 32
May 24, 1880, 6 Saw., 442.....30, 32
Re Ah Lee, May, 1880, 6 Saw., 410.....30, 32
Re Lee Tong, Nov. 3, 1883, 9 Saw., 335.....30, 31, 32
Re Wan Yin, Jan. 29, 1885, 10 Saw., 532.....30
Re Ah Fit, Feb. 4, 1886, 9 W. C. R., 383.....30
Re Tie Toy, Feb. 16, 1886, id., 387.....30, 106
Robb *v.* Connolly, May 5, 1884, 111 U. S. R., 624.....30, 33, 36, 104
State *v.* Olesen, 1 C. L. M., 589.....31
State *v.* Lee, 4 C. L. M., 79.....31
Lee Tong, 9 Saw., 335.....30, 31, 32
Report Judiciary Committee H. R.....31, 32, 33
Re Houghton, 7 Fed. R., 657.....32
Ex parte Watkins.....33
18 american law review, pp. 324–6.....33
Police power considered.....33
Civil rights cases, Oct. 13, 1883, 109 U. S. R., 13.....33, 106
S. P. W. Co. *v.* Shottler, Feb. 4, 1884, 110 U. S. R., 47.....33
Hurtado *v.* California, March 3, 1884, id., 516.....33
Kurtz *v.* Moffitt, Nov. 23, 1885, 115 U. S. R., 487.....33

PAGE
Police power, limited by 34
Stone *v.* F. L. & T. Co., Jan. 4, 1886, 6 S. C. R., 346 .... 34, 108
N. O. G. L. Co. *v.* L. L. Co., Dec. 7, 1885, 6 S. C. R., 252 34
Police power does extend 34
Re McClain, 61 Cal., 436 34
Ailstock *v.* Paige, 77 Va., 386 34
Re Lester, id., 663 34
Cone *v.* Merriam, 136 Mass., 433 34
Hochstadler *v.* state, 78 Ala., 24 34
Muller *v.* com'rs, 89 N. C., 171 34
State *v.* mayor, 15 Vr. (N. J.), 114 34
State *v.* Fay, id., 474 34
Cone *v.* Whelan, 134 Mass , 206 34
Re Liquor, etc., 13 R. I., 733 34
Code Tenn., Mill & V., 1884, §§ 5679 and 5666, act 1877, ch. 23 .. 34
State *v.* Turner, 11 Lea (Tenn.), 654 34
Legislature, prohibited by 34, 35
Police power indestructible and inalienable—
Taney, c. j., 16 How., 428 35
Extent of police power—
Martin *v.* Blattner, 25 N. W. R., 133 Iowa 35
Mette *v.* McGuckin, id., 339 Neb. 35
State *v.* board, etc., 26 id., 124 Minn. 35, 42, 85
B. W. Co. *v.* C. C. Co., 111 U. S. R., 746 35
Foster *v.* Kansas, 112 U. S. R., 201 35
Mo. R. R *v.* Haines, 115 U. S. R., 512 35
Collins *v.* Lean, 8 W. C. R., 766 35
State has power to regulate—
State may construe her own laws—
Hall *v.* De Cuir, 95 U. S. R., 504-15 35
Claiborne *v.* Brooks, April, 1884, 111 U. S. R., 400 35
Liebman *v.* C. & C. of S. F., 7 W. C. R., 301 36
Errors assigned 36, 37
Argument 37
Assignment of errors examined 39
Baltimore *v.* Radecke, 49 Md., 217 ..... 108, 42, 39
109 U. S. R., 13 39
Re Fraser, 54 Cal., 94 ..... 87, 42
Re Johnson, 62 Cal., 263 ..... 87, 42
Decisions restraining police power 42
Decisions asserting police power 42
Re Ruth, 32 Iowa, 250 ..... 85, 44, 42
Whitten *v.* Covington, 43 Ga., 422 ..... 45, 42

PAGE

State v. court, etc., 7 Vroom (N. J.), 72 ..... 81, 49, 42
Groesch v. state, 42 Ind., 343 ..... 82, 59, 42
State v. Ludington, 33 Wis., 107.. ..... 80, 64, 42
Rohrbacher v. Jackson, 51 Miss., 741..... 82, 69, 42
K. P. R. Co. v. Riley, 16 Kan., 576..... 69, 42
Eureka v. Davis, 21 Kan., 579 ..... 79, 72, 42
Pleuler v. state, 11 Neb., 547..... 76, 75, 73, 42
State v. Brown, 19 Fla., 564..... ..... 77, 42
Decisions supreme court of Iowa..... ..... 44, 43
Decisions supreme court of Georgia..... 45
New Jersey asserts her police power..... 49, 45
Parker v. commonwealth, 6 Barr., 507..... 56, 46
Rice v. Foster, 4 Harrington, 479..... 56, 46
Maize v. state, 4 Ind., 342..... 56, 46
State v. Parker, 26 Vt., 357..... 46
Santo v. state, 2 Iowa, 165..... 46
Patterson v. society, etc., 4 Zab., 385..... 46
Thurlow v. Massachusetts, 5 How., 504..... 48
Decisions of supreme court of Indiana 59, 50
Acts 1873, p. 151, et seq..... 50
R. R. Co. v. Geiger, 34 Ind., 185..... 54
Brown v. Buzan, 24 Ind., 194..... 55
Barto v. Himrod, 4 Seld., 483..... 56
Thorne v. Cramer, 15 Barb., 112..... 56
Bradley v. Baxter, 15 Barb., 122..... 56
Geebrick v. the state, 5 Iowa, 491. 56
The state v. Weir, 33 Iowa, 134..... 56
People v. Collins, 3 Mich., 343..... 56
Brinkmeyer v. city of Evansville, 29 Ind., 187 56
Mayor, etc. v. Roberts, 34 Ind., 471 56
Clarke v. city of Rochester, 24 Barb., 446 and 28 N. Y., 605.. 57
Smith v. Doggett, 14 Ind., 442..... 58
Decisions supreme court of Wisconsin..... 64, 60
Ross v. R R. Co., 6 Allen, 87..... 61
Burke's works, vol. 6, p. 22..... ..62
Decisions supreme court of Mississippi..... 69, 64
State may prohibit or regulate..... 66
Bartemeyer v. Iowa, 18 Wall., 129... ..... 83, 66
Police power extends restrictions on property and individuals..... 66
Thorpe v. R. & B. R. R. Co., 27 Vt., 149..... 66
House v. state, 41 Miss., 737 ..... 82, 78, 66
Donnell v. state, 48 Miss., 679..... 67

PAGE

People *v.* Simeon Draper, 15 N. Y., 545 67
Decisions of supreme court of Kansas 72, 69
Hartford fire ins. co. *v.* state, 9 Kan. 210 72
Decisions of supreme court of Nebraska 75, 72
Falmouth *v.* Watson 75
Decisions of supreme court of Florida 85, 76
Fla. A. & G. R. R. Co. *v.* P. & G. R. R. Co., 10 Fla., 145, 160 78
Mitchell *v.* Duncan, 6 Fla., 13. 78
Cooley's con. lim., 177, 180 ..... 85, 78
McConihe *v.* McMurray, 17 Fla , 238, 266 79
Decisions from Massachusetts, Iowa, Connecticut, Michigan, Illinois, Vermont, Indiana, New York 81
Com. *v.* Deans, 110 Mass., 357 81
Com. *v.* Bennett, 108 id., 27 81
Com. *v.* Turner, 1 Cush., 493 81
State *v.* Wilcox, 42 Conn., 364 81
Locke's appeal, 72 Pa. st., 491 81
Anderson *v.* com., 13 Bush., Ky., 485 81
San Mateo *v.* S. P. R. R. Co., 13 Fed. R., 723 83
Missouri *v.* Lewis, 11 Otto, 22, 31 85
Decision of supreme court of Minnesota 85
Decision of supreme court of Massachusetts 86
St. 1854, c. 118, § 35 86
Rev. ord., c. 37, § 11 86
Com. *v.* Davis, 4 N. E. R., 578 86
Decision of supreme court of California 86
Ex parte Yale, 24 Cal., 242 87
Objections to ordinance 87
Art. 1, secs. 11 and 21, state const 87
Re Hang Kie, 10 W. C. R., 52 ..... 106, 96, 88
Rehberg *v.* mayor, 2 N. E. R., 11 88
Amperse *v.* Kalamazoo, 26 N. W. R., 222–410 88
Re Conway, 1 At. R., 127 88
W. L. Murfree, sen., Feb., 1886, 7 crim. law mag., 143–4 88
Vanderlip et al. *v.* Derby, 26 N. W. R., 707 88
People *v.* Richmond, id., 770 (Mich.) 88
Re Bickerstaff, supreme court of California, April, 1866 88
2 Kent's Com., 340 89
No assumption of unwarranted authority, order 1569 90
Schofield *v.* White, 7 Cal., 400 91
People *v.* R. R. Co., 28 id., 254 91
Pierpont *v.* Crouch, 10 Cal., 315 92

PAGE

Ex parte Smith, 40 Cal., 419 92
Estate of Wixam, 33 id., 320 92
People *v.* Burt, 43 id., 560 92
People *v.* Sargent, 44 id., 430 92
§ 9, order 1767, repeals order 1691 ..... 92, 94
Order 1569 not repealed 92, 94
Order 1767 fixes limits within which 92, 94
§ 1, order 1569, still in force 92, 94
Judgment in *re* Yick Wo and in *re* Wo Lee affirmed 93
Extract, circuit court, Dec., *re* Wo Lee, 9 W. C. R., 82 ... 93
Passage of orders 1569, 1679, Quong Wo, 7 Saw., 531 .. 94, 92
Order 1679 was not amended by order 1569 ..... 94, 92
License depended on will of board of supervisors 94
Cir. court may have supposed, Wo Lee, 9 W. C. R., 83 ... 94
Order 1569 passed nearly 4 years before order 1767 ... 94, 92
Chinese successfully resisted all orders 95
Allegation that chinese applications are denied 95
Discrimination denied 95
Order 1719 does not mean prohibition as to chinese 95
Attempt to enjoin enforcement of order 1719 .....
Yick Wo *v.* Crowley, 8 W. C. R., 715 ..... 95, 97
Conclusion of circuit court *re* Wo Lee, 9 W. C. R., 85 96
§ 1977 R. S. W. S. and treaty with China 96, 106
Our brief in court below 97
Atty. for Tung Hing Tong affirmed that § 68 was in force and was obeyed 98
Order 1697 did not repeal any previous order 99
Portland *v.* Schmidt, 6 W. C. R., 40 99
Tung Hing Tong association, jeopardizing life and reducing value of property 99
Dangerous power of Tung Hing Tong association 99
Non-chinese laundries without scaffolds on roof 99
Organized resistance to law 100
People *v.* Ah Ling 100
City worsted in conflict with Tung Hing Tong over § 68, order 1679, order 1691–1719 100
Order 1767 102
Order under examination is not invalid, inoperative, unreasonable, discriminative or repealed 104
Re Robb, 64 Cal., 431 104
Review of plaintiff's points and authorities 105
Yick Wo decision, a set of findings 105
§ 1484, Penal C., and § 760, R. S. U. S, complied with ... 105

Page

Remedy in § 1979, R. S. U. S. 107
Permits to laundries employing chinese 107
Re Parrott, 6 Saw., 394 107
Henderson *v.* mayor, 92 U. S. R., 268 107
Cummings *v.* Mo., 4 Wall., 320 107
Chy Lung *v.* Freeman, 92 U. S. R., 279 107
Strauder *v.* W. Va., 100 U. S. R., 303 107
Re Virginia, id., 339 107
Neale *v.* Delaware, 103 U. S. R., 370 107
Bush *v.* Kentucky, 107 U. S. R., 110 108
Re Frank, 52 Cal., 610 108
Yates *v.* Milwaukee, 10 Wall., 497, 505 108
Transcripts received 109
Conclusion 111

IN THE SUPREME COURT OF THE UNITED STATES.

YICK WO, plaintiff, *v.* HOPKINS, defendant.

No.

In error to the supreme court of California.

Re Yick Wo, 8 West coast reporter, 548, December 28, 1885.

WO LEE, appellant, *v.* HOPKINS, respondent.

No.

Appeal from circuit court, ninth circuit, district of California.

Re Wo Lee, 9 West coast reporter, 81, January 26, 1886.

Points and authorities for defendant and respondent.

These two cases present the same question, the difference being that Wo Lee was engaged in the laundry business 25 years and Yick Wo 22 years.

The facts which are generally known are that the city of San Francisco is composed principally of wooden buildings, and several ruinous conflagrations have at different times laid her in ashes.

Within a small portion of the city the erection of wooden buildings is prohibited, and consequently new structures within the "fire limits" must be of brick or stone.

There are within (and without) the fire limits many dilapidated wooden buildings, some of them hardly fit for human habitation, which are rented, at very high rents, to chinese tenants, and used for laundries.

It might be safe to say that a dilapidated shed, which would not bring $5 per month from a white tenant, will be promptly taken by

a chinese for a laundry at $25 per month, and the landlord relieved of the expense of repairs.

One of the consequences of this use of the property is the raising of the insurance on the property in the neighborhood, and a depreciation in value of all the property within reach of the annoyance radiating from the laundry. (What these annoyances are will appear from the adjudged cases of Smith *v.* Ryan and Dolliver *v.* Ah Wing, which we shall presently refer to).

The municipal corporation known as the city and county of San Francisco, organized is under an act of the legislature of California, passed April 19th, 1856, but the powers possessed by the municipality were enlarged by art. XI, § XI, of the constitution of California, A.D. 1879.

On the 27th of February, 1880, the board of supervisors of San Francisco passed the following order:

ORDER No. 1559.*

REGULATING THE CONSTRUCTION OF LAUNDRIES.

The people of the city and county of San Francisco do ordain as follows:

SECTION 1. All buildings erected and used as laundries within the corporate limits of this city and county, on and after March 1, 1880, shall be constructed but one story in height, with brick or stone walls, not less than twelve inches in thickness, covered with a metal roof and provided with metal, or metal covered doors and window shutters.

SECTION 2. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment.

In board of supervisors, San Francisco, February 24, 1880.

After having been published five successive days, according to law, taken up and passed by the following vote:

AYES—supervisors Schottler, Mason, Litchfield, Drake, Whitney, Eastman, Fraser, Taylor, Doane, Bayly, Torrey, Stetson.

JNO. A. RUSSELL, Clerk.

Approved, San Francisco, February 27, 1880.

I. S. KALLOCH,

Mayor and ex-officio president board of supervisors.

This order was held valid in *re* White, 6 W. C. R., 644, June 1, 1885.

---

* NOTE.—This order was reënacted July 28, 1880, as § 67 of order 1587. See page 36 of orders, edition of 1884.

On May 26th, 1880, the board passed order 1569, which is as follows:

ORDER No. 1569,*

PRESCRIBING THE KIND OF BUILDINGS IN WHICH LAUNDRIES MAY BE LOCATED.

The people of the city and county of San Francisco do ordain as follows:

SECTION 1. It shall be unlawful from and after the passage of this order for any person or persons to establish, maintain or carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

SECTION 2. It shall be unlawful for any person to erect, build or maintain, or cause to be erected, built or maintained, over or upon the roof of any building now erected or which may hereafter be erected within the limits of said city and county any scaffolding, without first obtaining the written permission of the board of supervisors, which permit shall state fully for what purpose said scaffolding is to be erected and used and such scaffolding shall not be used for any other purpose than that designated in such permit.

SECTION 3. Any person who shall violate any of the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine of not more than one thousand dollars, or by imprisonment in the county jail not more than six months, or by both such fine and imprisonment.

In board of supervisors, San Francisco, May 24, 1880.

After having been published five successive days, according to law, taken up and passed by the following vote:

AYES—supervisors Schottler, Mason, Litchfield, Drake, Whitney, Eastman, Fraser, Taylor, Doane, Bayly, Torrey, Stetson.

JNO. A. RUSSELL, Clerk.

Approved, San Francisco, May 26, 1880.

I. S. KALLOCH,
Mayor and ex-officio president board of supervisors.

The validity of this order was attacked by the Tung Hing Tong association with success, as will appear from the following decision of the superior court (department XI) of San Francisco, May 7th, 1881:

People *v.* Ah Ling, on appeal from the police judge's court.

"Order No. 1569 is not authorized by the consolidation act, which is the charter of this city and county. It is oppressive, discriminating, unreasonable and arbitrary, and gives special privileges to such and only such as the board of supervisors may

*NOTE.—Order 1569 was re-enacted July 28, 1880, as §§ 68 and 69 of order 1587. (See page 36, orders, edition of 1884.)

> desire capriciously, or in its unrestrained discretion, to favor. It is in restraint of trade, and it tends directly and necessarily to the creation of monopolies. It is unconstitutional, because it does not operate equally and uniformly on all those who are within the same category. It confers special privileges on those who have the capital to build or have brick or stone buildings. It is an unwarranted and unauthorized interference with vested rights. It deprives a class—that is, the poor—from following a useful and necessary sanitary pursuit, and gives it exclusively to individual or corporate capital. For these and many similar reasons, I hold that the ordinance in question is unconstitutional and void. And the judgment of the court below is reversed."

This order, thus emasculated, remained dormant until resurrected in the year 1885.

Meanwhile the board of supervisors, June 10th, 1882, passed order 1679, which was held to be invalid by the circuit court July, 1882, in *re* Quang Woo, 7 Saw., 526.

The board of supervisors, October 21st, 1882, passed order 1691, but this order failed to command the obedience which had been refused to the previous orders. The chinese laundry association known as the Tung Hing Tong took to Washington the test cases of Tom Tong, 108 U. S. R., 556, and Hung Hang, id., decided May 7th, 1883, and pending these proceedings order 1691 was openly disregarded.

The board of supervisors, thus circumvented, passed order 1719,* June 25th, 1883, and repealed order 1691.

This order was sustained by the superior court (Wilson, j.) of San Francisco, November 2d, 1883, but subsequently it was held invalid by the superior court of Oakland, December 10th, 1883. *Re* Woo Yeck, 12 P. C. L. J., 384.

The decision of the state supreme court was then invoked, and order 1719 was sustained, February 8th, 1884. *Re* Moynier, 65 Cal., 33. *Re* Soon Hing, by supreme court in bank, March 13th, 1884 (not reported).

The great decisions of this court in Barbier *v.* Connolly, January 5th, 1885, and Soon Hing *v.* Crowley, March 16th, 1885, tended strongly to show that the superior court of San Francisco had erred in the decision of People *v.* Ah Ling, May 7th, 1881, and steps were taken to obtain a true interpretation of order 1569.

Mr. E. P. White, proprietor of White's and La Grande laundries,

---

* NOTE.—This order was sustained in Soon Hing *v.* Crowley, 113 U. S. R., 703, March 16th, 1885.

situate on 13th street, near Mission street, and an employer of 70 chinese, and about as many whites, was arrested, and in his case the following decision was rendered:

Superior court, city and county of San Francisco, state of California.

RE E. WHITE, HABEAS CORPUS.

1. Order 1569 and § 68 of order 1587 are not violative of article XIV of the constitution of the United States.
2. They are not *ex post facto* laws.
3. They are not oppressive, unjust, unfair, in contravention of public policy, in restraint of trade, or injurious to or restraining of a lawful business.
4. It is not discriminating as to business or as to wealth, and does not oppress the poor or tend to create monopolies.
5. It is within the police power of the municipality.

OPINION BY WILSON, J.

The petitioner was convicted in the justices' court of the city and county of San Francisco of the violation of an ordinance of said city, which, among other things, prohibits any person or persons from establishing, maintaining or carrying on a laundry within the corporate limits of said city and county, without having first obtained the consent of the board of supervisors thereof, except the same be located in a building constructed either of brick or stone, and sentenced to pay a fine of five dollars, and in default of the payment thereof to be imprisoned in the county jail at the rate of one day for each one dollar of the fine until the fine was satisfied.

Having been imprisoned, in pursuance of said judgment, he has sued out this writ of habeas corpus, and alleges that his imprisonment is unlawful, for the reason that the ordinances under which he was tried, convicted and sentenced are invalid, because:

(*a*) They are in violation of section first, article fourteen, of the constitution of the United States, and sections first, eleventh and twenty-first of the constitution of this state.

(*b*) The ordinances are *ex post facto*, and therefore void.

(*c*) The ordinances are oppressive, unjust, unfair, contravene public policy, in restraint of trade, injurious to and restrain a lawful business.

(*d*) It is discriminating and special in this: That it discriminates between persons engaged in the laundry business and those engaged in other business.

(*e*) It discriminates between persons of sufficient wealth to build of brick or stone and those whose poverty compels them to build of wood.

(*f*) It tends to create a monopoly of the laundry business in the hands of those who have or can build brick or stone buildings.

(*g*) It is not in the police power of the city and county of San Francisco under the consolidation act.

It must be conceded that if the ordinances are in violation of either the constitution of the United States or of the state, or are discriminating within the legal sense of that term, or are in restraint of trade, unreasonable, oppressive or arbitrary, or not within the police power of the city and county of San Francisco, or, in other words, if the board of supervisors, in passing said ordinances, exceeded their powers, then they are invalid, and a conviction based upon them cannot be sustained.

The section under which the prosecution was brought and is based reads as follows:

SECTION 1. It shall be unlawful, from and after the passage of this order for any person or persons to establish, maintain or carry on a laundry within the corporate limits of the city and county of San Francisco, without having first obtained the consent of the board of supervisors, except the same be located in a building constructed either of brick or stone.

This order first came before this court, so far as I am advised, in the case of the people *v.* Ah Ling, on appeal from the police judge's court, wherein, on May 7, 1881, the late judge T. W. Freelon rendered a decision holding that the ordinances were unconstitutional and void, and sustaining nearly every point claimed here on behalf of petitioner. Upon examining that decision, however, I find myself unable to agree with the views of the learned judge. I am clearly of the opinion that the board of supervisors had full power and authority to pass such an ordinance under article XI, section XI, of the constitution of this state, which reads as follows: "Any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws," even if that power was not conferred upon them by the consolidation act. If further power was required, however, it will be found in section 74 of the consolidation act, as amended May 18, 1861 (stat. 1861, p. 544), which provides, among other things, that the board of supervisors shall have power to make all needful regulations for protection against fire. And by section 3 of the act of March 30, 1872, it is provided that the board of supervisors shall have full power to regulate all such callings, trades and employments as the public good may require to be licensed and regulated, as are not prohibited by law.

An examination of this ordinance will show, I think conclusively, that it is purely a police regulation. The object evidently was to guard against fire. It may be readily perceived that there are some instances when the business might be carried on in a wooden building, when not situated contiguous to other property. In other instances it might be almost impossible to carry it on in a wooden building without being a constant menace to surrounding property. The board of supervisors, therefore, by this ordinance, have reserved the right to determine when it may be safely carried on, and when it would be dangerous to permit it, by either granting or refusing a license therefor. Nor is the order discriminating or special in any such sense as to make it repugnant to

the constitution. Its terms apply to all persons establishing, maintaining, or carrying on the business of a public laundry. And, as said by the United States supreme court in the case of Barbier *v.* Connolly, 113 U. S. R., page 27, it is not legislation discriminating against any one. All persons engaged in the same business are treated alike, are subject to the same restrictions, and are entitled to the same privileges, under similar conditions. In the same case the court further says: "Special burdens are often necessary for general benefits, for supplying water, preventing fires, and many other objects."

Regulations for these purposes may press with more or less weight upon one than upon another. But they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little inconvenience as possible, the general good. Though in many respects necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions.

In the case of Soon Hing *v.* Crowley, chief of police, etc., United States supreme court, March 16, 1885, 113 U. S. R., 703, it was held that there was no force in the objection that an unwarrantable discrimination is made against persons engaged in the laundry business, because persons in other kinds of business are not subject to the same restrictions, because there may be no risk attending the business of others, certainly not as great as where fires are constantly required to carry them on. The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because the restrictions are not imposed upon other businesses of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right that all can claim in the enforcement of the laws.

In the case of Barbier *v.* Connolly (supra), it was held that neither the fourteenth amendment nor any other amendment of the constitution of the United States was designed to interfere, or does interfere, with the power of a state, sometimes termed its police power.

In the case of Ex-parte Shrader (33 Cal., 297), the court said: "It is declared in the first article of the constitution that acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness, are inalienable rights, and that private property shall not be taken for public use without just compensation. And it is urged that the provisions of the order then under consideration contravene that clause. It is manifest, however, that the power exercised has nothing to do with eminent domain, the result of which, the petitioner complains, is personal imprisonment for a misdemeanor, and not a condemnation of his property to the public use without compensation. As to the other objection, that the order interferes with the constitutional right

of the petitioner to acquire, possess and protect property, both his rights and his capabilities in that regard are untouched by the order. Voluntary obedience to the order would have involved neither a surrender of the right nor a disuse or suspension of the capacity, and disobedience to it on the part of the prisoner has been visited with no description of civil disability. It has been followed by a personal imprisonment as a consequence of a criminal conviction under all the forms of the common law."

It is the same in effect in the case of ex-parte Andrews, 18 Cal., 678. It is further claimed, however, that this order is in conflict with the eleventh section of the first article of the constitution of this state. But this, as we have already seen, is not sustained, because it operates uniformly or in the same manner upon all persons who stand in the same category; that is to say, upon all persons who stand in the same relation to the law in respect to the privileges and immunities conferred by it, or the acts which it prohibits. Vide Brooks *v.* Hyde, 37 Cal., 366; Bolan *v.* Hildebolt, 26 Cal., 256; Ex-parte Keating, 38 Cal., 702; Smith *v.* Judge, etc., 17 Cal., 554; French *v.* Teschemacher, 24 Cal., 544.

It is further claimed that it is in conflict with section 21 of article I of the constitution of this state, which declares that "No citizen, or class of citizens, shall be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens;" but, as said by our supreme court in ex-parte Moynier, February 8, 1884, 1 W. C. R., 782: "We do not deem it necessary to go into an elaborate and extended consideration of the propositions advanced, nor to do more than to quote another section of the state constitution, and show its application to the subject in hand." And, after quoting section XI of article XI, further say: "The order is not discriminating and special in any such sense as to make it repugnant to the constitution. Its terms apply to all persons establishing, maintaining or carrying on the business of a public laundry."

It is further claimed that the ordinances are *ex post facto*, and are therefore void; but an inspectiom of them will show that this is clearly erroneous. It is further claimed that they tend to create a monopoly by confining the laundry business to those who have sufficient wealth to build brick or stone buildings. The same reasoning might be applied to an ordinance prohibiting the erection of wooden buildings within certain sections of the city, and yet it has never been seriously contended but what that power was vested in the board of supervisors.

In this state the delegation of police power to the board of supervisors by the constitution is exceptionally large, inasmuch as it provides that they may make and enforce all such local, police, sanitary and other regulations as are not in conflict with general laws.

In speaking of this police power, chief justice Shaw, in the case of Commonwealth *v.* Alger, 7 Cush., 85, says: "The power we allude to is rather the police power. The power vested in the state by the constitution to make, ordain and establish all man-

ner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same. It is much easier to perceive and realize the existence and source of this power than to mark its boundaries or prescribe limits to its exercise."

Under the constitution of this state, this power is fully vested in the board of supervisors, subject to the additional rule that their orders must not conflict with general laws.

See also ex-parte White, W. C. R., vol. 6, page 644. In the case at bar my attention has not been called to any general laws in conflict with the ordinances under consideration, and I am satisfied that none such exist. I am clearly of the opinion that the ordinances are valid, and not subject to any of the objections which have been urged against them; that the petitioner is legally held, and must be remanded to the custody of the sheriff of the city and county of San Francisco, and it is so ordered.

WILSON, Judge.

July 1, 1885.

In order to obtain the decision of the supreme court of this state, the case of Yick Wo was selected by the counsel for the chinese laundrymen as one which involved all the circumstances and presented all the points on which they relied.

The case was heard September 4th, 1885, by the supreme court in bank, briefs were filed within thirty days, and the case decided December 28th, 1885. 8 West coast reporter, 548.

Thereafter the case of Wo Lee was brought in the United States circuit court, presenting the same issues, and decided January 26th, 1886. 9 West coast reporter, 81.

These cases were civil actions (*re* Tom Tong, 108 U. S. R., 558), and it is to be regretted that "the facts found and the conclusions of law" were not "separately stated," as required by § 633 of the code of civil procedure.

We deny all the allegations in the petitions which we do not expressly admit.

We quote from our brief in the supreme court of California:

At the hearing on the return, the petitioner excepted as follows:

[TITLE OF COURT AND CAUSE.]

"The petitioner, Yick Wo, excepts to the sufficiency of respondent's return, upon the ground that the said sections referred to in said return are invalid, inoperative, unreasonable, discriminative and repealed, and the said petitioner also refers for facts established to his said petition, and the respondent's admissions in writing herein filed.

"L. H. VAN SCHAICK,
"attorney for petitioner.

"D. L. SMOOT, counsel for petitioner."

The petitioner also filed the following admissions of respondent:

[TITLE OF COURT AND CAUSE.]

Respondent admits:

1. That petitioner is a native of China, and came to California in A.D. 1861.

2. That petitioner is still a subject of the emperor of China.

3. That petitioner has been engaged in the laundry business, at 349 Third street, for 22 years last past.

4. That petitioner had a license, a certificate from the board of fire wardens, and a certificate from the health office, copies of which are hereto annexed.

5. That the board of supervisors assumed to pass order number 697, May 4th, 1866, and that the board passed the following orders:

Order	1,098,	June 23d,	1873.
"	1,135,	Feby. 4th,	1874.
"	1,264,	Mar. 5th,	1876.
"	1,429,	May 1st,	1878.
"	1,547,	Dec. 15th,	1879.
"	1,559,	Feb. 27th,	1880.
"	1,569,	May 26th,	1880.
"	1,587,	July 28th,	1880.
"	1,679,	June 10th,	1882.
"	1,691,	Oct. 21st,	1882.
"	1,719,	June 25th,	1883.
"	1,746,	Nov. 6th,	1883.
"	1,762,	Mar. 5th,	1884.
"	1,767,	April 8th,	1884.

6. That petitioner applied to the board of supervisors, to wit, June 1st, 1885, for consent of said board to maintain and carry on his laundry, but that said board, to wit, July 1st, 1885, refused said consent.

7. That the city license of petitioner is in force, and expires Oct. 1st, 1885.

Respondent, in order to save time, makes the following admissions, reserving his objection and exception to the admissibility of the evidence. The respondent contending that the following admissions are immaterial and irrelevant.

8. Respondent admits that the statement on page 6 of the petition as to the number of laundries in San Francisco—the number owned by subjects of China—the character of the material of which they are constructed, capital invested, and the amount paid annually for rent, license, etc., is substantially true and correct.

9. Respondent also admits that the statement contained in subdivision vi. of the petition as to arrests, etc., is substantially true and correct, with this qualification, that 80 odd laundries referred to are in wooden buildings without scaffolds on the roof.

10. Respondent admits that petitioner and 200 of his countrymen similarly situated petitioned the board of supervisors for permission to continue their business in the various houses which they had been occupying and using for laundries for more than 20

years, and such petitioners were denied, and all the petitions of those who were not Chinese, with one exception of Mrs. Mary Meagles, were granted.

ALFRED CLARKE,
counsel for respondent.

The respondent thereupon asked, and obtained, leave of the court to file, and then and there did file certain photographs of laundries in San Francisco, to wit:

Ex. 1. Photograph of Yick Wo's laundry, 349 Third street.
Ex. 2. Photograph of Jim Kee's laundry, 1,233 Howard street, seen from the north—the Hibernia Brewery in the foreground.
Ex. 3. Photograph of Jim Kee's laundry, 1,233 Howard street, seen from the west—the laundry in the foreground.
Ex. 4. Photograph of We Wo's laundry, 505 Minna street, seen from the west.
Ex. 5. Photograph of Sang Lee's laundry, 924 Howard street, seen from the north.
Ex. 6. Photograph of Sang Lee's laundry, 924 Howard street, seen from the east.
Ex. 7. Photograph of We Wo's laundry, 505 Minna street, seen from the north.

I.

We contend that on the issues of law which spring from the return, and the exception thereto, the facts admitted by us are irrelevant and immaterial. We quote from section 1,484 penal code. "*The party may deny or controvert any of the material facts or matters set forth in the return, or except to the sufficiency thereof, or allege any fact to show either that his imprisonment or detention is unlawful or that he is entitled to his discharge.*"

What are the pleadings in *habeas corpus?*

The proceeding is initiated by the purchase of a writ. Here we find the counterpart of the old common law practice where the demandant purchased his writ at the chancery, which writ went to the sheriff and afterwards the demandant filed his declaration. True, with us the writ issues without money and without price, but we say that the issues do not arise on the petition, but on the return and the demurrer thereto, or traverse thereof; *vide* § 1,484 penal code and § 760 revised stat., U. S. "The return and all suggestions made against it may be amended * * so that thereby the material facts may be ascertained," R. S., U. S., § 760. Why not amend the petition? Because it would be vain. When the writ has issued the petition is defunct.

This matter of practice becomes important in this case because on the argument the very learned counsel for petitioner referred to "matters alleged in the petition which respondent *had not denied;*" and, we quote from petitioner's exception, "*petitioner also refers for facts established to his said petition.*"

To deny the matters alleged in the petition would be as vain as to question the thunder where the lightning was going to strike. It has struck or we should not have heard the thunder. No facts are

"established" *on the hearing* by the petition for the writ. The allowance of the writ satisfies the petition and brings the jailor into court to show affirmatively why he holds the prisoner. The petition is then exhausted and defunct.

We claim that the allegations and the proofs must correspond.

Stout *v.* Coffin, 28 Cal., 65.
Tomlinson, *v.* Monroe, 41 Cal., 94.
Rowan *v.* Bowles, 21 Ill., 17.
Tucker *v.* Parks, 7 Colo., 62–8.

The petitioner "excepts to the sufficiency of the return," but he has not alleged any facts which can be proved by our admissions, in other words there is no allegation to be sustained by the proof, if the proof is admissible. "*The evidence must correspond with the allegations and be relevant to the question in dispute.*"

C. C. P., § 1868.

We contend:

a. That as there are no allegations to be supported or proved by our admissions, the admissions should be disregarded; and

b. That the admissions do not show, or tend to show, that the orders in question are invalid, inoperative, unreasonable, discriminative or repealed.

But if we are mistaken in these views we say that the only facts before the court are our return, our admissions, and our exhibits.

Our first seven admissions we regard as immaterial and irrelevant and in no manner affecting the validity of the orders under examination.

The admissions 8, 9, and 10 are manifestly immaterial and irrelevant and they are given subject to and controlled by our exception to their admissibility.

We respectfully suggest that the preservation of the constitutional distribution, and limitations of the judicial power of the state, is a matter as important as the personal liberty of any person is or can be.

The constitution vests the local police power in the municipalities throughout the state. The concomitant judicial power is vested in the justice's and police courts, subject to correction by appeal to the superior court in each county.

This court will declare invalid any municipal ordinance when its invalidity plainly appears on the face of the order, or by evidence legally before the court, but we say that the question whether the orders we are examining are invalid, inoperative, unreasonable. discriminative, or repealed, are questions belonging in the first instance to the police and justice's courts, in the exercise of their original jurisdiction, and to the superior courts, in the exercise of their appellate jurisdiction, and such decisions are law. The return shows the petitioner to be in custody apparently lawful. The exceptions to the return are not supported by anything apparent on the face of the return, or by any evidence properly before the court.

We say, therefore, that, inasmuch as this court cannot say, on inspection of the return, or from any evidence properly before it,

that the orders in question are invalid, inoperative, unreasonable, discriminative, or repealed, the writ should be discharged and the prisoner remanded.

II.

But are the orders in question invalid, inoperative, unreasonable, discriminative, or repealed?

On February 27, 1880, order 1,559 was passed. It related only to laundries to be built in the future. This order was held valid in *re* White, 6 west coast reporter, 644. Order 1,569, now under examination, was passed May 26, 1880 (*vide* page —, *ante*). The wisdom and moderation of the order is apparent at a glance. In this large city, constructed principally of wooden buildings, the matter of protection against fire is of the first importance. New laundries were required to be of brick or stone; but what about the old ones? There were some laundries built of wood, two or three stories high, well ventilated, well drained, employing hundreds of operatives, some of whom were chinese, and representing large capital, and in which every precaution against fire was carefully taken.

There were other structures used as laundries, constructed in the cheapest manner, of rough redwood boards, not even painted on the outside, not even bearing on the inside the momentary protection against fire which a coat of plaster would give; in which at late hours of the night, and all night, charcoal stoves, red hot, were used for ironing clothes, by the light of coal oil lamps; all constituting a tinder-box ready to be ignited by the upsetting of a lamp, and the structure being surmounted with a scaffold for the purpose of drying the wash over the roof (see the photographic exhibits of respondent), and then read order 1569, and mark the moderation of the remedy. There is no discrimination against the chinese contemplated or reasonably probable under the order, and it seems clear as light that the scope and object of the order is reasonable protection against fire.

The power to make all needful regulations for *protection against fire* was granted by § 74 of the consolidation act as amended May 18th, 1861: Stat. 1861, p. 544. The rates established by insurers show the necessity for regulating this business, and the scope of the order is to transfer this business from wooden tinder-boxes with scaffolds on the roof to brick or stone buildings without scaffolds.

Of the eighty odd laundries not carried on by chinese, two pay $20 license; two pay $12 license; nineteen pay $6 license; and the remainder are so insignificant that the city does not require a license from a laundry carried on by one or two women and employing less than three persons.

The two large laundries have applied to the supervisors for consent, which, we understand, has been granted. None of these 80 odd laundries have the scaffolds on the roofs, which is one of the objectionable features of the dangerous laundries which are championed by the *Tung Hing Tong*. We are not informed whether more than two of the 80 odd laundries have consent of the supervisors.

If they have, it is because, on account of their situation as to adjacent buildings, they are not dangerous; and if they have not, they are in the same situation as the laundries championed by the *Tung Hing Tong*. They ought not to be permitted, and, therefore, they have not received the consent which has been refused to Yick Wo.

SAN FRANCISCO AN IMPERIAL CITY.

Mr. Joel Prentiss Bishop, in his valuable work (A.D. 1873) on statutory crimes, has some remarks (§§ 18 to 26 inclusive) on the legislative power of municipal corporations.

We quote: "Municipal corporations are created by an act of parliament, or the king's charter; usually by the latter. In this country they exist only by statute. The legislature can amend or repeal an act of incorporation at pleasure, or can force such an act on the corporators against their will. (§ 18.) But a distinction has been made between the authority to make by-laws and the general power of making laws." (§ 19.)

At the time the above was written, there was no city on our continent possessed of the power which San Francisco wields to-day. The constitution of 1879 found her a mushroom creation of the legislative will, subject to change as smiles or frowns should succeed each other on the visage of the legislature.

This constitution left her with a crown of power upon her brow, and a scepter of authority in her hand, which make her the primal municipality in the United States in the matter of local self-government.

We hold that, among the truths which are self-evident, is one: that the sovereign powers, or the powers of the sovereignty, are inalienable and indestructible.

The power of local legislation for the suppression of local wrongs, or the amelioration of social mischiefs, is among these inalienable and indestructible powers. This power is denied to the legislature by art., iv., § 25, of our constitution. (*Re* Westerfield, 55 Cal., 550.) But is it extinguished? We say the constitution (art., xi., § xi) answers NO.

Re Chin Yan, 60 Cal., 81.
Re Ah Toy, 57 Cal., 92.
Re Casinello, 62 Cal., 540.
Re Ah Sing, 59 Cal., 404, construing § 33, order 1587.
Los Angeles *v.* S. P. R. R. Co., 61 Cal., 59.
Re Stuart, 61 Cal., 375.
Re Benniger, 64 Cal., 291.
Marini *v.* Graham, 6 W. C. R., 766.
Re Moynier, 65 Cal., 33.
Re Soon Hing, March 13, 1884, by supreme court in bank, not reported.
Re Wolters, 65 Cal., 269.
People *v.* Dwyer, 3 W. C. R., 438.
Re Mount, 5 W. C. R., 575.
Barbier *v.* Connolly, 113 U. S. R., 27.
Soon Hing *v.* Crowley, id., 703.
Portland *v.* Schmidt, 6 W. C. R., 40.

Re Yick Wo, 8 W. C. R., 548.
Re Li Protti, 9 W. C. R., .

What are the municipal powers of San Francisco to-day? We reply, they are all the powers granted by the consolidation act of April 19, 1856, *plus* nearly 300 amendments to 1878, *plus* all the powers granted by art. xi., § xi., of the constitution, *plus* all the local legislative power denied to the legislature under art. iv., § 25, of the constitution.

In the great basin of our continent, some rivers sink—they are not lost—the current still flows on, and, in the proper time and in the proper place, the waters reappear and pursue their march toward the ocean which fed the sources whence they came. And so with us, the inalienable and indestructible powers of the sovereign which are denied to the legislature by our constitution are vested in the municipality because they must exist and they cannot exist elsewhere.

This brings us back to the inquiry, whether the order in question is within the police power of a sovereign state.* To ask the question is to answer it. No municipality could exist without the protection of such power, and if it were otherwise, it would be possible for a few gunpowder men, butchers, or laundry men, to destroy the center of population of such municipality.

The distinction, therefore, which Mr. Bishop speaks of between the authority to make by-laws and the general power of making laws is extinguished by our constitution, and San Francisco has the general legislative power which the ordinary municipalities did not possess.

The order must be sustained if it is within the police power of a sovereign state, and we have both precedent and authority to support our contention that the order is within the police power of the state. In the year 1860, some persons in San Francisco were engaged in swindling and corrupting poor people under the guise of keeping an intelligence office. The legislature, to remedy the evil, passed an act, May 17, 1861, authorizing the board of supervisors "to direct the auditor to issue license to *so many and such persons* as they may deem properly qualified to keep intelligence offices in San Francisco." (Stat. 1861, p. 412.) This act came before the supreme court in Hall *v.* board of supervisors, 20 Cal., 591, and was sustained. This act is a part of the present charter of San Francisco, being continued in force by the new constitution. The principle of this act is precisely the same as the order under examination. The supervisors were, and are, to judge of the qualification of the intelligence office keeper. Seducers and swindlers were, and are, to be kept out of the business In like manner, the board of supervisors, under this order, are to judge of the propriety of granting consent to the keeping of a laundry in a wooden building. This is to be determined on

*NOTE.—"The only limits upon the legislative power of the state are those imposed by the constitutions of the state and the U. S." People *v.* Marx, June, 1885, N. Y. court of appeals, 99 N. Y., 377; 6 crim. law. mag., 739; 2 N. E. R., 29.

examination of the premises, having reference to the adjoining property. It is not to be presumed that the sovereign power, whether exercised by the supervisors or any other arm of the government, will act oppressively. We have very ancient and respectable authority fer believing that it is wrong to "speak evil of the ruler of thy people" (Exodus 22, 28; Acts 23, 5), and we have irrefragable proof of the untruth of the assertion that the board of supervisors are disposed unjustly to "discriminate against the chinese" in the fact that out of twenty-seven intelligence offices in San Francisco, seven are kept by chinese under the express co: sent of the board of supervisors, granted under the statute to which we have above referred.

We have seen that, under this statute, the board of supervisors absolutely refused to consent to a white american citizen (20 Cal., 591) keeping an intelligence office, and granted the privilege to seven chinese, whose names and places of business are as follows:

Sam Kee, 511 Bush street.
Leon Seung, 409 Geary street.
Wm. Queon & Co., 403 Sutter street.
Gee Chong Poo & Co., 635 Clay street.
Quong Sue Lung & Co., 733 Clay street.
Tung Chung, 646 Pacific street.
Foo Chong, 604 California street.

The municipal orders* of San Francisco have for many years prohibited the erection or use of steam engines or boilers within certain limits without permission from the board of supervisors.

The board has granted permits to chinese,† in several instances, to erect and use steam engines and boilers within the prescribed limits. At No. 839 Clay street, in the heart of Chinatown, Tie Hing & Co. carry on a very extensive business, using steam engines for sawing and splitting firewood, the engineer and helpers being chinese, and they are now putting up new boilers of increased power. It will be remembered that a considerable number of white laborers made their living by sawing firewood, and if it were true that the supervisors were disposed to "oppress the chinese," as charged by the *Tung Hing Tong*, it would be easy to find some excuse for interfering with the use of steam by the chinese, especially where it comes into competition with white laborers. The fact that the board of supervisors have granted these permits is very strong evidence of the untruth of the charge of oppression made by the *Tung Hing Tong*.

It should be noticed that the last legislature passed an act (stat. 1885, p. 45) prohibiting the erection in any city of any fence exceeding ten feet high *without the consent of the board of supervisors*.

---

*NOTE.—§ 34 of order 1,752.

†NOTE.—Lee Lee, 627 Pacific street, Oct. 7, 1867, No. 7,498; Kim Wing, Spofford alley, Dec. 26, 1882, No. 16,040; Poy Kee & Co., 75 to 79 Stevenson street, April 14, 1884, No. 16,972.

This is another instance of confiding to the supervisors the regulation of a local municipal matter.

"*The alleged obstruction was legalized by the board of supervisors.*" Marini *v.* Graham, 6 west coast reporter, 766.

This quotation is from a very interesting case. The general law of the state, as well as the city ordinance, prohibited the obstruction of the street; nevertheless, the board of supervisors granted Marini a permit, by resolution 15,814, to occupy 3 feet 5 inches of a sidewalk which was only 10 feet wide, and this court, June 23, 1885, held the permit to be good.

The People *v.* Marx (June, 1885,) by the New York court of appeals, 99 N. Y., 377, 2. N. E. R., 29, 6 C. L. M., 730, is a most instructive case. We quote: "The sole object of the enactment was to protect the dairy industry of the state against the substitution of a cheaper article" (than butter). * * * "It is one of the fundamental rights of every american citizen to adopt and follow such lawful industrial pursuits, *not injurious to the community*, as he may see fit."

The italics are ours, and we have emphasized them for the purpose of showing that in the case at bar the use of these wooden laundries, with scaffolds on the roof, is highly *injurious to the community.* The Marx decision is by full court of the highest authority, and is supported by live stock association *v.* crescent city, etc., 1 Abbott, U. S., C. C. 398, A. D. 1870; Corfield *v.* Coryell, 4 Wash., C. C. 381, A. D. 1823, and the slaughter-house cases, 16 Wallace, 62 A. D. 1873. See also:

Barbier *v.* Connolly, 113 U. S. R., 27.
Soon Hing *v.* Crowley, id., 703.
People *v.* Cipperly, 4 N. E. R., 109.

We claim that the municipality can regulate an occupation, and that it can prevent the impending mischief by proper regulation before it becomes a nuisance. This principle is taught in *re* Delaney, 43 Cal., 479.

What the Tung Hing Tong does.

An eminent jurist said "*when we take our seats on the bench, we are not struck with blindness and forbidden to know, as judges, what we know as men.*" (5th Sawyer, 552.)

Do we know that there are in San Francisco a large number, to wit, 3,000 foreigners, who have created a * *Tung Hing Tong* association, which exercises legislative, executive and judicial power in this city and county in opposition to the lawful authorities.

That the *Tung Hiag Tong* regulates the laundry business conducted by its members.

That it has employed and now employs at very great expense, some of the most distinguished, fertile and powerful members of the bar of San Francisco to defend its members when charged with violating the regulations of the municipal government of San

* Note.—See affidavit of L. H. Van Schaick, Esqr., on file *in re* White, No. 20,113, in department two of this court, and brief of counsel for Chin Yen.

Francisco.* That it does not admit american citizens to membership, and that it owes no allegiance to the laws of the land. That it encourages, practices and defends open and continuous violation of such laws of the land as do not receive its approbation. That it does not respect and has not respected the decisions of our police courts, superior court, or even the decisions of this august tribunal when these decisions are unsatisfactory to the *Tung Hing Tong*.

That the *Tung Hing Tong* represents 300 laundries employing 3,000 persons and controlling nearly a quarter of a million of capital, paying annually for rent, license, gas and water, $180,000. That its power of taxation is unlimited. The industry of its members so untiring that they "are willing to work as many hours a day as nature will permit," * * * "by relays of help the whole twenty-four hours of each day continuously, Sundays included."†

Interjection: We have read of the slave trade, the man sellers of Africa and the man dealers of California, but where is the emancipation proclamation and the xiiith amendment?

Have not the man dealers got a bonanza?

That the concentrated power wielded by the *Tung Hing Tong*, springing from the united purpose, the united action, and the united contributions of its numerous constituents, renders it a formidable opponent to the municipal government of San Francisco, and that in the matters which affect its interests it employs very acute lawyers, who, by their subtlety and superior management, obstruct the enforcement of the law in the lower courts.

That in two instances these able attorneys, by plausible argument in the superior court, obtained opinions, which were afterwards disapproved by this court.‡ That it blocked the police courts from February to October, 1884, by demanding jury trials in 300 cases, and that it assumes that its members have a right to continue to violate the law even after the supreme judicial authority of our state has decided that their objections to the validity of the law are untenable and void, and that the law is valid and binding.

That the *Tung Hing Tong*, by its attorney general, has lodged pleadings against the municipal government of San Francisco in the federal courts, charging that the supervisors adopted the laundry order, "not from any legitimate police regulation or sanitary purpose, but for the purpose of oppressing the chinese engaged in the laundry business."‖ That the municipality of San

---

*NOTE.—Illustrations: Tom Tong, 108 U. S. R., 556; Hung Hang, Id.; Soon Hing *v.* Crowley, 113 U. S. R., 703. The police courts suffocated with 300 cases from February to October, 1884. The case at bar.

†NOTE.—See page 28 of brief of attorney general for the *Tung Hing Tong; in re* Soon Hing, Nos. 842-1,181, in October term, 1884, supreme court of the United States.

‡NOTE.—*Re* Woo Yek, by a judge of superior court, in Oakland, Dec., 1883, 12 P. C. L. J., 382, and People *v.* Ah Ling, by a judge of the superior court, San Francisco, May 7, 1881. See pages 3 and 4 of this brief.

‖NOTE.—See folio 15, page 5, of transcript, Soon Hing *v.* Crowley, No. 1,181, October term, 1884, in supreme court of the United States.

Francisco has changed her law officers by election periodically from the time of the passage of the first laundry order to the present time, but the *Tung Hing Tong* only change their attorney general when he loses an important suit, the last change being April 5, 1885, twenty days after the decision of the supreme court of the United States in Soon Hing *v.* Crowley, 113 U. S. R., 703.

That in the latter case the attorney general, for the *Tung Hing Tong*, in the supreme court of the United States, disparaged the decision of this court, saying (page 37 of brief) that the decision of department two in Moynier's case, 65 Cal., 33, "is not satisfactory, and was not well considered, and does not give the law, and entirely ignores 38 Cal., 325, and 55 Cal., 550, which was decided by the court in bank, five judges concurring;" and all this after this honorable court in bank, having heard argument, upon consideration, refused, March 13, 1884, to grant Soon Hing a writ, thereby adopting and approving the doctrine of the Moynier decision.

This wealthy and powerful corporation not only manages the law business of its constituents, but it is vigilant to see that the interests of its members are not remotely affected by decisions in which caucasians are litigants, and it employs at very large expense attorneys who have been conspicuous for their talents or success, to intervene in such cases,* and appear as *amicus curiæ;* and having so appeared, and the decision being unsatisfactory to the *Tung Hing Tung*, it disparages the decision by commenting on it as follows:

"The question as to laboring after 10 o'clock, P. M., etc., is there disposed of in a half dozen lines by the following argument (?):

"'We cannot say that it is not necessary for the proper police and sanitary condition of the city that the business referred to should cease during the hours from 10 o'clock P. M. to 6 o'clock A. M., and during the day known as Sunday.'"

The above quotation, including the mark of interrogation, is taken from page 37 of the brief for plaintiff in Soon Hing *v.* Crowley, in the supreme court of the United States.

That the *Tung Hing Tong* caused to be printed in Washington, and published in the supreme court of the United States, certain defamatory matter concerning the municipal government of San Francisco, among which the following:

"That the supervisors, knowing the habit of the chinese of working in laundries on Sunday, and the late hours of the night, and that these people compose nearly all the persons engaged in that business within the prescribed limits, to carry out their desire to oppress the chinese by unjust discrimination, not only by preventing them from working during the night, but they also deprive them of the privilege awarded by the state to every person therein engaged in any other legitimate avocation or calling, to labor or pursue his business without restraint on Sunday, passed the prohibitory ordinance. The extension of the prohibition to Sunday, renders apparent the intensity of the feeling of the super-

*NOTE.—Instances: *Re* Moynier, 65 Cal., 33; *Re* White, No. 20,113.

visors to pamper to the antipathy and hatred of the people mentioned and referred to in the applicant's petition, as well as their persistent determination to discriminate against and to the ruin of the chinese; and to make the law apparently less obnoxious, the prejudice of christians against labor on the Sabbath, was thereby appealed to and invoked, to militate, hide and conceal the vicious discrimination which is made by said section 4, in prohibiting work at night after ten o'clock P. M., or during the early hours of the morning."

Soon Hing *v.* Crowley, 1,181, 113 U. S. R., 703. Brief for plff., p. 18.

Upon the representations of the *Tung Hing Tong*, the above accusation was not sustained, as will more fully appear from the opinion of the supreme court of the U. S. 113 U. S. R., 703.

The city of San Francisco has not oppressed the chinese. On the contrary, she has taken them under her wing and protected them when they were abused and driven out of other places.

The orders we are examining have not been specially enforced against the chinese. The board of supervisors have granted only two permits to white laundrymen, and in each of these cases chinese are employed to the number of seventy in one laundry and forty in the other. The white laundrymen who have not permits have been arrested, and their cases are pending in the same courts in which the arrested chinese are pending. In the chinese cases there are nearly two hundred convictions, and yet not more than some half-dozen fines of $10 each have been imposed. The effort of the city authorities has been to induce the laundrymen to move into brick buildings, and this has been accomplished in several instances without serious injury to the business of the laundryman.

The capital of $200,000 invested by the chinese consists of a few bars of soap and a few gallons of water in each of their three hundred wash-houses, a lease or tenancy of a rookery which would not bring ground rent from a white tenant, but for which they pay a very high rent. Having thus established themselves and secured a circle of patronage, the insurance on adjacent property is raised and its value diminished by reason of their presence, but as long as they can continue business, even at the risk and sacrifice of contiguous property, the good-will of the business may be sold for what another chinaman will give for it, say $600. It needs no argument to show that this precarious value is founded on a constant peril to the community, which ought to cease as soon as reasonable diligence could correct it.

The case of Quong Woo, 7 Saw., 526, July, 1882, has been cited against us, and we feel authorized to draw the attention of the court

to some matters which were not brought to the notice of the circuit court in that case:

PHOTOGRAPH OF A WASH-HOUSE.

Judge Hunt of the superior court rendered a decision, Dec. 12, 1882, in the case of C. J. J. Smith *v.* James Ryan, known as the "chinese laundry case."

STATUS OF THE CASE.

The action was to recover damages for a nuisance occasioned upon the premises of the defendant and for an injunction prohibiting its continuance.

The defendant Ryan owns certain premises on Laguna street. Plaintiff owns premises situated 122½ feet south of defendant's land. Both lots are improved, and between them there is a two-story structure. Last April Ryan leased, from month to month, the premises owned by him to the defendant, Ah Hine, for laundry purposes, and the latter has ever since used the premises for this purpose.

WHAT THE EVIDENCE SHOWS.

The evidence of the plaintiff on the trial, said judge Hunt, abundantly shows that odors of the most offensive character are emitted from said premises, odors which have been described as resembling the commingled smells of pork, rancid oil and opium.

It further appears that the defendant, Ah Hine, accelerated the cleansing process by beating and swashing the clothes upon a table or board, and that the thumping and pounding thus occasioned oftentimes continued far into the night and sometimes as late as two o'clock in the morning, thereby disturbing the plaintiff's rest and interfering with his repose.

Other witnesses had been introduced who testified that they had been similarly annoyed. The evidence further shows that the odor in question entered the rear of plaintiff's house whenever the windows in that portion of the house were opened, and sometimes permeated said house when the windows were closed; that the meat used in plaintiff's house, contained in the pantry next adjoining said premises, was so tainted by said odor as to become unfit for domestic use.

Evidence was also offered tending to show that the proximity of said laundry to the plaintiff's premises had not only diminished their rental value, but had also deteriorated said premises in value.

This latter element of damages, however, under the decision of our supreme court in the case of Hopkins *v.* W. P. R. R. Co., 50 Cal., 190, I am not at liberty to consider.

It is claimed by the defendant said premises are used for the ordinary and usual purposes of a chinese laundry; that no offensive odors are emitted therefrom; that said vocation is a lawful one, and that said business is carried on in the usual and ordinary manner pertaining thereto.

THE LAW OF THE CASE.

The law does not regard every business or use of property as a nuisance that may taint the air or offend the sense of smell, because such result must, to some extent, at least, follow from the ordinary pursuit of business or the customary use of property. Nor will it interfere with a business or pursuit simply because it may occasion annoyance or inconvenience to neighbors. The business of a laundry, whether conducted by chinese or white persons, is a legitimate business, so far as it is carried on without producing injurious results; it is also lawfully exercised. But if such business, by whomsoever conducted, is hurtful to others, or materially injures their property, or affects their health, it then becomes a nuisance.

The code of this state defines anything which is offensive to the senses, or an obstruction to the free use of property so as to interfere with the comfortable enjoyment thereof, as a nuisance, and the subject of an action for which the injured party is afforded a remedy, either by abatement or a civil action.

The evidence shows that the odor emitted from the defendant's premises was of the most offensive character, affecting not only the plaintiff's enjoyment of the premises, but, also, to some extent, his wife's health. The right to pure air is a natural right, and incident to the enjoyment of land, and its sensible pollution by the exercise of a noxious trade or calling, whereby the comfort of life or property is diminished, has long been recognized by courts of equity as entitling the injured party to relief.

It is claimed in this case that the odors in question are such as are necessarily incident to any habitation occupied by chinese, and witnesses were produced by defendant who testified that, in their opinion, there was nothing offensive in such odors.

WHAT IS NUISANCE.

While it is true that courts will not relieve if the inconvenience complained of is more fanciful than real, or if such objection is prompted by mere fastidiousness, nevertheless, the circumstance that a number of witnesses can be produced to testify that the matter complained of is not objectionable to them, will not, of itself, defeat the plaintiff's right of recovery in a proper case.

As has been said by the supreme court of Massachusetts in the case of Davis *v.* Sawyer, 15 central law journal, 251, in reference to the ringing of a factory bell within two or three blocks of the residence of plaintiff, and thereby disturbing his rest: "Noise which constitutes any annoyance to a person of ordinary sensibility to sound, such as to interfere with the ordinary comfort of life and impair the reasonable enjoyment of his habitation, is a nuisance to him. The fact that the sensibility of other persons to the sound may have become so deadened that it ceased to disturb them, shows that the noise was not a nuisance to them, but does not change its character as to others. Many persons can, by habit, lose, to some extent, their sensibility to a disturbing noise, as they can to a disagreeable taste, odor or sight, but it is because they become less than ordinarily susceptible to the particular impression."

NUISANCE OF AN AGGRAVATED CHARACTER.

As I have previously stated, the evidence abundantly proves that offensive and noxious odors have been customarily emitted from these premises, and if it be assumed that the defendant cannot carry on his business without these evil consequences, then it would seem that such business is a nuisance of a most aggravated character, and, if on the other hand these evils are attendant, not upon the business itself, but rather upon the manner in which the defendant carries it on, or in which he lives, then the plaintiff is equally entitled to relief. A smell, however occasioned, which is so objectionable that one is compelled to keep his windows closed to prevent its entrance into his house; which taints domestic provisions and offends the senses, would seem to be an injury entitling the party complaining thereof to relief. Indeed, the impregnation of the atmosphere by noisome odors has been regarded as among the worst class of nuisances, and a learned writer in his treatise upon this subject has said that "the books are full of cases in which any use of property producing these results has been regarded as a nuisance." (Wood on Nuisances, 541.)

PROTRACTED NOISES AT NIGHT.

It is a well settled rule of law that noise alone, even when unaccompanied with the other objectionable elements hereinbefore referred to, may create a nuisance and be the subject of an action for damages, especially when, as appears in this case, these noises are protracted far into the night, thereby tending to disturb rest. It is said that the real test as to whether a trade or vocation is a nuisance to a particular person is whether it is of such a character as would be likely to be physically annoying to a person of ordinary sensibilities, or whether it is carried on at such unreasonable hours to disturb rest.

The noise herein complained of seems to have been constant and continuous, repeated, as one of the witnesses testifies, several times a minute, two hours at a time, and in its effect must necessarily have occasioned physical annoyance by day and loss of sleep at night.

INJUNCTION AND FINE.

In view of these facts, I shall order that the defendant herein be restrained and enjoined hereafter from making or continuing said noise. But in view of the difficulty of defining and limiting the extent of the restraining order, as to the odor in question, a difficulty enhanced by the circumstance that the evidence fails to disclose the cause of such odor, I have concluded not to make such order.

The nuisance in question is a continuous one, and it is a well settled rule of law that in such cases the plaintiff can only recover damages up to the time of the commencement of the action, every injury caused by the continuance of such nuisance forming a new and distinct cause of action.

It appears from the evidence that the defendant in this case is a man of moderate means, and in view of this fact, and inasmuch as the result of this action will establish plaintiff's right at law,

and as the nuisance has not been of long continuance, I have concluded to award the plaintiff as damages the sum of $300, and judgment in accordance with this opinion is hereby ordered.

We make the following extract from the complaint in the action, Dolliver *v.* Ah Wing et als., in the superior court, department two, number 15,658, in which a perpetual injunction was granted by Judge Sullivan, January 25th, 1886:

"That from the said premises, owned by the defendant, Michael Brophy, used and occupied by the other defendants, there issues noxious and offensive smells, which noxious and offensive smells are caused by the said defendants, the occupants of the premises No. 1588 Bush street, in the course of their business in using said premises as a public laundry; and said noxious and offensive smells taint and corrupt the atmosphere, and render the said tenement house of the plaintiffs unpleasant for the tenants thereof, and thereby greatly diminishes its rental value.

"That the said premises so owned by said Michael Brophy, and occupied by Ah Wing and the other defendants, as a wash-house, is overcrowded by Chinese and made noxious and offensive by them; and each and every night numerous employees of Ah Wing and the other defendants (except Michael Brophy) make loud and offensive noises by beating clothes upon stones and other hard substances.

"That the said noises are incessantly continued far into the night, thereby interfering with the sleep and comfort of the occupants of plaintiffs' tenement-house, and thereby diminishing its rental value.

"That the defendants herein (except Michael Brophy) use part of said wooden house No. 1588 Bush street for the purpose of drying clothes, and for that purpose maintain a stove therein in which is kept a constant fire without any protection against igniting the wood work of said building, thereby incurring great risk and danger of burning said building, and those in the vicinity thereof, to the great jeopardy of the premises of these plaintiffs.

"That by reason of the foregoing facts the rate of insurance on the premises No. 1588 Bush street has been more than doubled, and the rate of insurance on the premises of the plaintiffs has been greatly increased.

"That defendant Ah Wing has been twice arrested in the last few weeks for violating the ordinances of the board of supervisors of the city and county of San Francisco in regard to laundries or wash-houses; but he threatens to continue his wash-house until closed by law.

"That since the arrest of defendant Ah Wing on July 9th, 1885, the said premises No. 1588 Bush street has been on fire, but the said Ah Wing refuses to abate the nuisance in any degree, and says he will not discontinue his wash-house or change his mode of conducting his business until all the laundries do so.

"That the said Ah Wing has applied to the board of supervisors for a permit to carry on his said wash-house at No. 1588 Bush

street, but was refused a permit by resolution No. 18,328, new series."

Duly verified by Mary W. Dolliver, Aug. 1, 1885.

FIRE INSURANCE IN SAN FRANCISCO.

	RATE.
Dwelling solo	$ 60
" next to dwelling	70
" next to wash-house	1 20
Grocery solo	1 50
Store-building solo	1 50
Wash-house solo	3 00
Wash-house next to dwelling	3 10

SAN FRANCISCO, Nov. 22d, 1883.

Alfred Clarke, Esq.—DEAR SIR: In response to your inquiry as to what effect, from a fire insurance standpoint, the maintenance of a frame building occupied as a chinese wash-house has upon adjoining property, I beg to submit the following as the minimum charges adopted therefor by the board of fire underwriters of this city:

To a brick building it adds 15 per cent.
" frame " " 60 " .

Whereas, should the latter have been exposed instead by a dwelling or store the charge for such exposure would be 10 cents for the former or 30 cents for the latter. Although this is the established scale adopted, there exists among many underwriters a conviction that it does not compensate for the hazard created, and so they refuse not only to write upon such laundries, but also upon property immediately exposed thereby.

Yours, very truly,

ROBT. DICKSON,
Chairman of fire department and water supply committee of the board of underwriters.

OFFICE CHIEF OF POLICE,
SAN FRANCISCO, August 28th, 1885.

GENTLEMEN—There is an important question now before the courts, in which the benefit or injury of an ordinary laundry conducted by chinese, located alongside of a family dwelling, will be considered. Will you favor me with your opinion as to the effect on a dwelling, say of the value of $5000, if such a laundry should be established immediately adjoining the same? Would the market value of the property be affected, and if so, how much, and the like question as to the rent?

Respectfully yours,

ALFRED CLARKE.

To Madison & Burke, S. F.

OFFICE MADISON & BURKE, REAL ESTATE AGENTS,
401 & 403 Montgomery street, cor. California.
SAN FRANCISCO, August 28, 1885.

Mr. Alfred Clarke, city—DEAR SIR: In reply to the annexed letter of the 28th inst, we would state that we think that the occupation of a laundry kept by chinese would depreciate the value of such dwelling as you describe fully $500, and that it would affect the rent from $5 to $10 a month. The prejudice against chinese is so great that some tenants will not occupy a building adjoining them at all. Of course, in making this estimate, you will understand that there are some modifications: namely, as to the number of men employed, and as to the cleanliness with which the business is conducted.

Yours, respectfully,
MARTIN J. BURKE & SON,
Successors to Madison & Burke.

Mr. Thomas Magee estimates the depreciation in the value of the dwelling at twenty per cent., and in the rental value thirty per cent.

Our photographic exhibits show the objectionable exterior of the structures we are describing, and we would remind the court that the scaffolds on the roofs are prohibited by § 2 of order 1569 and § 69 of order 1587.

If the court will examine our admissions in the lower court, it will be found that there is no admission that the proprietors of the eighty odd non-chinese laundries applied for permits; and the truth is that only two of them had so applied. We admitted that all the petitions of non-chinese, excepting Mary Meagles, were granted—but these petitions were two, and no more. One was for the United States laundry on Sixteenth street, near Valencia, employing 40 chinese; and the other was for White's laundry, on Thirteenth street, employing 70 chinese.

We are willing that all the facts should be known to the court, and as it is claimed by appellant that the facts show discrimination against the chinese, we say that in our judgment the facts show the reverse.

There are about three hundred laundries in San Francisco managed by chinese. Some of them (perhaps ten) are in brick buildings, as required by law. The remainder are in wooden buildings, and some of them are circumstanced so favorably as regards location, etc., that they will doubtless receive the consent of the board of supervisors to carry on their business. Others are highly dangerous and a great detriment to the neighborhood in which they are

situated. (See our photographic exhibits and the cases of Ryan *v.* Smith and Dolliver *v.* Ah Wing, pages 21–25, *ante.*)

The three hundred laundries we are noticing employ about three thousand persons. In almost all cases the land is owned by whites, and the buildings are generally owned by whites. The interest of the chinese tenant is the good-will of a business requiring a very small capital for its management.

The board of supervisors of San Francisco, who understand this question, do not desire to suppress this useful business, neither do they desire to exclude it arbitrarily from certain limits, but they desire to get rid of its dangerous features, and to transfer the business from wood to brick buildings in all cases where the wooden building is dangerous to adjacent property. There is no hardship in this change, and it must be enforced, and has been enforced, without partiality.

There is a peculiarity connected with these three hundred laundries which invites attention. They have a central government to which whites are not admitted. This government regulates the number of laundries in certain districts, and in order that its edicts may not produce inconvenience one or two houses (shanties) will be built, if necessary, before its inspectors count the houses between the laundries of its constituents, and the shanties are removed after the count is finished. This central government is known as the Tung Hing Tong association. It employs very able attorneys to resist all such regulations as are inconvenient to its members, and this fact explains the many defeats which the city has suffered in the laundry order litigation. Among the white laundrymen there is no organized opposition to the enforcement of the law, and no concert of action for any purpose. All the white laundrymen who have failed to comply with the law are under arrest.

It is a familiar doctrine that when people have solemnly admitted certain facts and sought to gain the benefit of such facts, they are afterwards forbidden to deny the existence of such facts. This rule applies to the Tung Hing Tong in this case. In September, 1883, before the superior court of Alameda county, in the case of Woo Yek, and in December, 1883, before the supreme court, in *re* Moynier, 65 Cal., 33, it pleaded that the section we are now examining, viz: § 1 of order 1569 and § 68 of order 1587 were in force and actually obeyed. We quote:

> "Besides, a further answer to this is to be found in the fact that laundries are carried on in fire-proof brick buildings as re-

quired by ordinance 1587 and 1559 of the General Orders of the board of supervisors of the city and county of San Francisco, which are as follows:"*

Quoting order 1559 and §§ 67 and 68 of order 1587, which latter is the same as order 1569.

This plea was made under the following circumstances: The syndicate of chinese laundrymen known as the Tung Hing Tong, having acquired three-fourths of the laundry business of San Francisco, desired to take in the remaining one-fourth so that they should have a monopoly of the business. The white laundry business was carried on without labor at night and on Sundays. The chinese competitors desired to work "as many hours a day as nature will permit by relays of help the whole twenty-four hours of each day, continuously, Sundays included."† The Tung Hing Tong resisted every laundry order passed by the board of supervisors from 1880 till 1885, and in consequence of this resistance and the delay resulting from legal proceedings, the novel spectacle was witnessed in an American city of a colony of foreigners who governed themselves, made and executed their own laws, and successfully resisted the enforcement of the regulations of the municipal government of San Francisco.

We have shown that order 1559 was invalidated by the decision in People *v.* Ah Ling, May 7th, 1881.

That order 1679, passed June 10th, 1882, was invalidated by the circuit court, July, 1882, in *re* Quong Woo, 7 Saw., 526, p. 20, *ante.*

That order 1691, passed October 21, 1882, was taken to the supreme court of the United States; *re* Tom Tong, 108 U. S. R.; *re* Hung Hang, id., decided May 7th, 1883, and the city unable to enforce the order, repealed it June 25, 1883, by the passage of order 1719.

That order 1719 was invalidated by the superior court of Oakland, *re* Woo Yek, 12 P. C. L. J., December 10th, 1883.

And that during all of this wonderfully protracted and successful resistance, it was impossible to enforce the municipal regulations in regard to laundries.

---

* NOTE.—See brief of *amicus curiæ* in *re* Moynier, 65 Cal., 33, Feb. 8th, 1884, a copy of which was filed in the supreme court of the United States, in Barbier *v.* Connolly, 113 U. S. R., 27.

† NOTE.—See page 28 of brief *re* Soon Hing, Nos. 842–1181, October term, 1884, in supreme court of the United States.

The tide which set so strongly and so long against the citizens of San Francisco turned at last and flowed the other way.

In *re* Woo Yeck, November, 1883, by superior court of San Francisco, in which order 1719 was held valid.

Re Moynier, February 8th, 1884, by supreme court of California, 65 Cal., 33, which holds order 1719 valid.

Re Soon Hing, March 13th, 1884, by supreme court of California (in bank), not reported. Same decision.

Barbier *v.* Connolly, January 5th, 1885, by supreme court of the United States, 113 U. S. R., 27. Order 1767 held valid.

Soon Hing *v.* Crowley, March 16th, 1885, by supreme court of the United States, 113 U. S. R., 703. Order 1719 held valid.

Re White, June 2d, 1885, by supreme court of California, 6 W. C. R., 644. Order 1559 held valid.

Re White, July 1st, 1885, by superior court of San Francisco, municipal reports, 1884–5, p. 84. Order 1569 held valid. (See pages 5 to 9 of this brief.)

Re Yick Wo,* December 28th, 1885, by supreme court of California (in bank), 8 W. C. R., 548. Order 1569 held valid.

Re Wo Lee,† January 26th, 1886, by circuit court of the United States, 9 W. C. R., 81. Same result.

Re Li Protti, February 26th, 1886, 9 W. C. R., 812.

Re Guerrero, March 16, 1886, 9 W. C. R. ——

It seems to be clear that if the latter line of decisions are correct (as we believe they are), the earlier line must be erroneous, and this consideration brings us to one of the most interesting and important questions which these cases present.

Has the supreme judicial tribunal of any sovereign state in this union, power and authority to determine the validity of the laws of the sovereignty to which it belongs? or,

Must the state, in every instance, be subjected to the hazard of a decision by a district court of the United States upon its powers as measured by the constitution and laws of the State?

---

* † NOTE.—The cases *Yick Wo* and *Wo Lee* are the cases now at bar.

These questions are of national importance, and upon them judges good and wise may differ honestly.

In order to illustrate our argument we refer to the following cases:

a. 1880, February 5th—Wong Yung Quy, 6 Saw., 237, a federal court takes jurisdiction of a state law, regulating the removal of dead bodies; and,
b. 1880, May 24th—6 Saw., 442. *Held*, the law valid.
c. 1880, May—*Re* Ah Lee, 6 Saw., 410.
d. 1882, July—*Re* Quong Woo, 7 Saw., 526.
e. 1883, November 3d—*Re* Lee Tong, 9 Saw., 335.
f. 1885, January 29th—*Re* Wan Yin, 10 Saw., 532.
g. 1886, February 4th—*Re* Ah Fit, 9 W. C. R., 383.
h. 1886, February 16th—*Re* Tie Loy, id., 387.

In all these cases it was contended that the state law violated the fourteenth amendment to the federal constitution. In all these cases the petitioners were in custody of a state court of competent jurisdiction. The state court was bound to respect the constitution and laws of the United States, and had *authority to determine such questions of federal law*, subject to correction by the supreme court of the United States.

Robb *v.* Connolly, 111 U. S. R., 624, May 5th, 1884.

The jurisdiction of the federal and state courts is "only concurrent;" by Sawyer, J., *re* Wo Lee, 9 W. C. R., 86, January 26th, 1886.

It is a well established rule that where concurrent jurisdiction exists, the court which first takes jurisdiction of the person or thing will retain the jurisdiction to the end of the suit, and yet in all these cases the federal court took the case out of the state court while the case was subject to the cognizance of the judicial power of the state.

In *c*, *supra*, the petitioner, Ah Lee, was in the custody of the state court under sentence of death. Rightly or wrongly exercised, he was indisputably in the custody of the judicial power of the state of Oregon. The writ was denied by the United States district court, not for want of jurisdiction of the questions presented, but upon the merits, which were fully examined by the court. This case was brought to the notice of congress March 8th, 1884, as we shall presently see. Pages 31–2 *infra*.

In regard to case *d*, *supra*, we find a contrary line of cases which were not noticed, and we presume were not presented to the notice of the court. We shall discuss them hereafter.

In case *e*, *supra*, we remark that the question appears to be one of municipal law arising under the constitution and laws of Oregon, and therefore belonging to the judicial power of the state. There

is no reference to state *v.* Olesen, 1 C. L. M., 589, or state *v.* Lee, 4 C. L. M., 79, both by the supreme court of Minnesota, and we may infer that these cases were not presented to the court. As we understand these cases they conflict with Lee Tong, 9 Saw., 335.

On the 29th of January, 1885, the district court of the United States, at Portland, Oregon (*f, supra*), held a $5 license for a laundry to be invalid, and on February 26th, 1886, the supreme court of California (*re* Li Protti) held a $7 license for the same business, to be valid. See also *re* Guerrero, March 16, 1886, 9 W. C. R. ——; state *v.* Bennett, February 11, 1886, 26 N. E. R., 714.

Notably, in cases *e, f* and *g, supra*, the questions were of state law and proper to be solved in the regular orderly course of judicial proceedings by the state judiciary, subject to correction by the supreme court of the United States on any question of federal law.

Suppose the supreme court of Oregon should hold the orders in the cases *e, f* and *g* to be valid and the (district) federal court hold them invalid, who shall reconcile these contradictions?

NOTE. We make the following extract from a report of the judiciary committee of the house of representatives, March, 1884, Judge Poland chairman:

> "The district judge of Vermont, a very learned and accomplished judge, discharged a party upon a writ of *habeas corpus* under the following circumstances:
>
> The man had been convicted in the county court (which is a court of general criminal jurisdiction) of passing counterfeited national bank bills. The legislature of the state had expressly made the act a crime against the state. The man was convicted and sentenced to the penitentiary, from which he was released by this writ. The judge held, that by the proper construction of the revised statutes, the states were prohibited from making such an act punishable, or giving their courts jurisdiction over it, and that, therefore, the state court had no proper jurisdiction and their judgment was void; and secondly, that the man was restrained of his liberty "in violation of the laws of the United States," and, therefore, came within the provisions of the act of 1867.
>
> Notwithstanding the high character of the judge by whom this decision was made, the committee are not ready to accede to the soundness of either proposition on which the decision was based. It certainly admits of very grave doubt whether congress has any constitutional power to prevent the states from making such acts crimes against the state, and giving jurisdiction to their courts to punish them. They do not, however, desire to enter into any argument as to the soundness or unsoundness of this particular decision. The fact is apparent, that if this jurisdiction is sustained, the final judgments of the highest courts of the states may be held void and overturned by a single federal judge of the low-

est judicial rank, and from his decision there is no appeal. *Re* Houghton, 7 fed, rep., 657.

In re Wong Yung Qui, the petitioner for the writ had been convicted of a statutory offense, and was in custody under sentence. He was discharged by a federal judge, because he held that the state statute contravened some provision of the Burlin game treaty. 6 Saw., 237.

NOTE.—See page 30, *ante*. This seems to be a mistake; prisoner remanded. 6 Saw., 410.

In re Ah Lee, a chinaman, had been convicted of murder in a state court, and the conviction affirmed in the supreme court of the state (Oregon), but the district judge of that state, on *habeas corpus*, did not hesitate to inquire into the jurisdiction of the state court, and into the legal constitution of the court itself The petitioner was not discharged, but for no lack of jurisdiction in the judge himself. 6 Saw., 442.

But the latest, and perhaps the most extraordinary exercise of this jurisdiction by a federal judge, and in the same state, in the case *in re* Lee Tong. The petitioner was prosecuted and arrested for violation of an ordinance of the city of Portland for the suppression of gaming. The judge decided that the city ordinance went beyond the law of the state, and was not, therefore, a legal ordinance; consequently; the arrest was unlawful; and the petitioner was restrained of his liberty without 'due process of law,' and, under the fourteenth amendment, the federal courts had power to discharge him by *habeas corpus*. 9 Saw., 335.

If this reasoning be sound, then any unlawful imprisonment by anybody, for any cause, is 'without due process of law,' and federal courts and judges have jurisdiction to liberate by *habeas corpus;* in other words, federal courts and judges have sole jurisdiction in all cases of imprisonments under federal authority, and concurrent jurisdiction with the state courts and judges in all other cases.

These cases, and some others that might be cited, show that under this act of 1867, the early and long established idea of keeping the jurisdictions of national and state tribunals distinct and separate, as to this class of cases, is entirely overturned.

The committee do not believe that congress, in passing the act of 1867, intended any such thing, or that the true construction of the act warrants any such thing. Nor does there seem to have been any occasion for such action, or to stretch federal jurisdiction into the clear domain of state jurisdiction, as has been done. In the Vermont case, if the petitioner claimed that the Vermont statute under which he was convicted, conflicted with a national statute, a writ of error would have carried his case to the supreme court of the United States, if the state court decided against his contention. So, if he did not raise the question on his trial, but the court had no jurisdiction, so that the conviction and sentence were void, the state courts and judges had ample jurisdiction to relieve him on *habeas corpus*.

The same may be said in substance of the other cases. But if

the act of 1867 intended to allow interference in cases of arrests by state officers, under state authority, the committee do not believe that it was contemplated by its framers or can properly be construed to authorize the overthrow of the final judgments of the state courts of general jurisdiction, by the inferior federal judges, whose judgment shall be final, and thus make them a court of errors over the highest tribunals of the states. The supreme court, as early as *ex parte* Watkins, decided that when a court has pronounced judgment in a case where it has general jurisdiction of the subject matter, that judgment, unless reversed in a direct proceeding for that purpose, pronounces the law of the case.

The english courts have steadily refused to examine the validity of convictions of their colonial courts by the use of this writ, but have upheld them as rightful and lawful, unless reversed on appeal to the privy council.

The jurisdiction assumed by federal judges, if allowed to continue, and continue unrestrained and unquestioned, cannot fail to bring the two judicial systems into serious and painful conflict, unless the state courts shall tamely submit to be shorn of the jurisdiction they have exclusively exercised since the government existed. The bill referred to the committee attempts to curtail and restrain to a certain extent the powers assumed by the federal judges under the act of 1867. The committee finds this a nice and difficult task. The special causes which were deemed sufficient to make the act of 1867 necessary, may exist yet to some extent, so that the committee do not feel justified in recommending its repeal. They deem it advisable now to do no more than to recommend the restoration of the right of appeal to the supreme court, just as the act of 1867 gave it, and therefore report a bill to that effect as a substitute for the bill referred to them. With this right of appeal restored, the true extent of the act of 1867, and the true limits of the jurisdiction of the federal courts and judges under it, will become defined, and it can then be seen whether further legislation is necessary." See 18, American law review, pages 324–6.

The foregoing decisions *a*, *b*, *c*, *d*, *e*, *f*, *g* and *h* are not harmonious with the recent decisions of the supreme court of the United States, as will be seen in the following cases:

The civil rights cases, 109 U. S. R., 13, Oct. 13th, 1883. There is a great dissenting opinion by Harlan, J.

S. V. W. W. *v.* Shottler, 110 U. S. R., 347, Feb. 4th, 1884; great dissenting opinion by Field, J.

Hurtado *v.* California, id., 516, March 3, 1884; great dissenting opinion by Harlan, J.

Robb *v.* Connolly, 111 U. S. R., 624, May 5th, 1884, in which the Booth and Tarble cases are distinguished.

Kurtz *v.* Moffit, 115 U. S. R., 487, Nov. 23, 1885; and other cases cited, in which the fourteenth amendment is limited so as not to interfere with the police power of the state.

"The police power of the state is limited only by the constitutions of the United States and of the state."

People *v.* Marx, 2 N. E. R. 29, June, 1885. 99 N. Y., 377.

"Every person and thing within the state is subject to the authority of the state.

Stone *v.* F. L. & T. Co., January 4, 1886; 6 S. C. R. 346, *and cases therein cited.*

The state may regulate the "location" of a business.

N. O. G. L. Co. *v.* L. L. Co., December 7, 1885; 6 S. C. R. 252, *and cases therein cited.*

We claim that the city has power to adopt the section we are examining under article XI section XI of the constitution "to make and enforce all such local, police, sanitary and other regulations as are not in conflict with general laws."

The police power of the state does extend to the regulation of this business by excluding it from certain limits, as shown by

Re McClain, 61 Cal. 436.
Re Chin Yan, 60 Cal. 78.
Re Ah Sing, 59 Cal. 404.
The slaughter-house cases, 16 Wall. 62, *et seq.*
Ailstock *v.* Paige, 77 Va. 386.
Re Lester, Id. 663.
Com. *v.* Merriam, 136 Mass. 433.
Hochstadler *v.* State, 78 Ala. 24.
Muller *v.* Com'rs, 89 N. C. 171.
State *v.* Mayor, 15 Vr. (N. J.) 114.
State *v.* Fay, Id. 474.
Com. *v.* Whelan, 134 Mass. 206.
Re Liquor, etc., 13 R. I. 733.
Code Tenn., Mill & V., A. D. 1884, §§ 5679 and 5666; Act 1877, ch. 23.
State *v.* Turner, 11 Lea (Tenn.) 654.

Under our state constitution, the legislature is prohibited by art. 4, sec. 25, sub. 2, from exercising the local police power; but the power which is denied to the legislature is vested by art. XI sec. XI, in the municipal corporations throughout the state.

Re Stewart, 61 Cal. 374.
Re Moynier, 65 Cal. 33.
Re Soon Hing, March 13, 1884. By supreme court in bank; not reported.
Re Wolters, 65 Cal. 269.
Re Mount, 5 W. C. R. 575.

Barbier *v.* Connolly, 113 U. S. R. 27.
Soon Hing *v.* Crowley, Id. 703.
Re Yick Wo, 8 W. C. R. 548.
Re Li Protti, 9 W. C. R. 812.

The police power is indestructible and inalienable, and being (so far as the regulation of local matters) denied to the legislature, it must reside in the municipalities.

The sovereign people have located this power in the municipalities, and it is now too late to question its existence.

See observations by Taney, C. J., in 16 How. 428.

In addition to the cases heretofore cited, we refer to the following as recent illustrations of the extent of the police power:

Martin *v.* Blattner, 25 N. W. R., 133 Iowa.
Mette *v.* McGuckin, Id. 339 Neb.
State *v.* Board, etc., 26 Id. 124 Minn.
People *v.* Cipperly, 4 N. E. R. 107 New York.
B. U. Co. *v.* C. C. Co., 111 U. S. R. 746.
Foster *v.* Kansas, 112 U. S. R. 201.
Mo. R. R. *v.* Humes, 115 U. S. R. 512.
Collins *v.* Lean, 8 W. C. R. 766.

Admitting for the sake of argument that the laundry of petitioner was not a fully developed common-law nuisance, we say the state has power to regulate it, as was shown in Barbier *v.* Connolly, 113 U. S. R. 27.

The washing of Mr. Barbier was not a nuisance, but it was regulated. See also—

Re Delaney, 43 Cal. 478.
Re Yick Wo, 8 W. C. R. 548.

It has been held that "the state may construe her own laws."
Hall *v.* DeCuir, 95 U. S. R., 504–515.

"The supreme court of the United States cannot pass on the question of the conformity of a municipal ordinance with the state constitution."
Barbier *v.* Connolly, 113 U. S. R., 27, Jan. 5th, 1885.

Is not this exactly what was done by the district court of the United States at Portland, Oregon, in the above cases—*e*, *f*, and *g*?

"When the courts of a state have settled the extent and character of the powers which its political and municipal organizations shall possess, the decisions are authoritative in the United States courts."
Claiborne *v.* Brooks, 111, U. S. R., 400, April, 1884.

We would ask how could the supreme court of a state, "the legitimate expounder of state statutes" (by Field, J., August, 1885, in Liebman *v.* C. & C. of S. F., 7 W. C. R., 301), ever get cognizance of any of the above cases (*a* to *h*, inclusive), if the federal court of first instance deprives the state court of its prisoner before the issues are determined in the state court?"

We apprehend that the law of a state is to be found in its constitution and statutes, *and the decisions* of its courts as to its statutes and local police regulations, and such decisions *are law* until reversed or corrected in the regular and orderly course of judicial proceedings, as pointed out in Robb *v.* Connolly, 111 U. S. R., 624, and Wo Lee, 9 W. C. R., 81.

The circuit court of the United States, in the case at bar (Wo Lee, 9 W. C. R., 81, January 26th, 1886), in an opinion remarkable for its force, demonstrates the invalidity of the order, and the supreme judicial tribunal of our state, in the case at bar, gives an elaborate opinion (Yick Wo, 8 W. C. R., December 28, 1885), showing its reasons for taking a contrary view.

This brings us to

THE ERRORS ASSIGNED.

A. 1st—The court should have discharged the petitioner because the ordinance is against natural right, in that it requires the consent of the supervisors to carry on a necessary and harmless occupation, without prescribing reasonable or any terms upon which such consent may be obtained. The law-makers reserving to themselves the right to grant or refuse permission arbitrarily.

B. 2d—The court should have discharged the petitioner because the ordinance is a legislative condemnation to heavy pains and penalties of all persons who wash clothes for hire in frame buildings, whether constituting a nuisance or not, contrary to subdivision III, section IX, article I, of the constitution of the United States, prohibiting bills of attainder.

C. 3d—The court should have discharged the petitioner because the immediate effect of the ordinance is to deprive the petitioner and others similarly conditioned of their property and property rights without due process of law, or any legal process whatever, contrary to section I, article XIV, of the amendments to the constitution of the United States.

D. 4th—The court should have discharged the petitioner because the said ordinance is capable of being so operated and enforced as to discriminate against the petitioner and all other subjects of the chinese empire, similarly conditioned, contrary to section I of the fourteenth amendment, section 1977 U. S. rev. stats., and articles V and VI of the treaty of 1868, and articles II and III of the treaty of 1881 between the United States and China.

E. 5th—The court should have discharged the petitioner because the said ordinance is operated and enforced against chinese subjects only, contrary to the said constitutional, statutory and treaty guaranties. The board of supervisors refusing all subjects of China permission to wash clothes for hire, in frame buildings, while granting such permission to all other applicants.

We apprehend that this court will take these cases as they came from the court below, and for convenience we reprint here the exception to our return:

[TITLE OF COURT AND CAUSE.]

"The petitioner, Yick Wo, excepts to the sufficiency of respondent's return, upon the ground that the said sections referred to in said return are invalid, inoperative, unreasonable, discriminative and repealed, and the said petitioner also refers for facts established to his said petition, and the respondent's admissions in writing herein filed.

"L. H. VAN SCHAICK,
"attorney for petitioner.

"D. L. SMOOT, counsel for petitioner."

ARGUMENT.

The sovereign state of California, in the exercise of her police power, passed the order we are examining. Its object was to prevent our people from being burned in their beds at night by careless and irresponsible people using dangerous fires in wooden shanties so inflammable that no underwriter would insure them.

Our adversary denies the validity of the order, and writes his challenge in the exception we have quoted. The supreme judicial power of our sovereign state carefully examines all his points, and answers that THE ORDER IS NOT (1) invalid, (2) inoperative, (3) unreasonable, (4) discriminative, or (5) repealed.

We apprehend that the errors which this court is asked to correct should be errors of law committed by the court below upon issues of law properly raised and actually presented, urged and decided in the court below. This case was decided on briefs, and it shall be our special care to forward a set of these briefs, in order that this court may know *therefrom* what was presented to the court below.

There was no issue joined on bills of attainder in the court below, and yet we find ourselves charged in the 2D error assigned here with having passed a bill of attainder.

We had no notice of this aspect of the case in the lower court. If we had we might have shown by proof that fire statistics, real estate statistics, insurance statistics, sanitary and police statistics,

mortuary statistics, the spread of the opium vice, extensive corruption of children and servants by traffic in lottery tickets (5-cent drawings twice a day), all demonstrate the expediency of *regulating* these laundries. We find on page 3 of petition for rehearing this question: "Who ever heard or read of a fire originating in a laundry in San Francisco, unless it were one started by hoodlum incendiaries?" If this question had been asked before the proofs were closed, we might have shown many such cases, and that some people (caucasians) fight fire and put it out, and in such cases will face death to rescue life, and some other people run away and let the clothes and shanty burn, not saving, or trying to save, two small children, who were burned to death at No. 248 Eleventh street, on the 21st day of May, 1885. We might have shown that the Tung Hing Tong passed a bill of attainder against us, and that our loss and suffering was heavy and severe. We do not think that we have passed any bill of attainder, or that this court will decide that we have without giving us a hearing in the court below upon that question.

Did the supreme court of California err (on any question of federal law) in holding the order was not "invalid, inoperative, unreasonable, discriminative or repealed?"

Does the question of the "repeal" of the order present a federal question?

The state says the order is "valid," and that she passed it in the exercise of her police power, which she never surrendered to the federal government. There may be a federal question here, and perhaps the 3D assignment raises it.

Did our court err in deciding that the order was not "inoperative?" If yea, is the error a federal question? The plaintiff says it is inoperative, and yet complains that it is, too, operative.

Did our court err in deciding that the order is not "unreasonable?" If yea, is that a question of federal law? When did the states promise the United States that they would not pass unreasonable laws?

Did our court err in deciding that the order was not "discriminative?" If yea, is the error a federal question? And is there any assignment of error to bring up the question?

THE ASSIGNMENT OF ERRORS EXAMINED.

A. We think the 1ST assignment is insufficient. It points to no question of federal law. We suppose it is based entirely on Baltimore *v.* Radecke, 49 M'd., 217, A.D. 1878, and *re* Quong Wo, 7 Saw., 531, July, 1882. It should be remembered that congress in the passage of the "civil rights" bill undertook to deal directly with certain matters which this court held, October 13, 1883, belonged to the states subject to the corrective power of congress. (109 U. S. R., 13). It should not be a matter of surprise that when congress dealt by direct legislation with theaters, hotels, etc., the federal courts should deal directly with wash-houses* or cemeteries† or murderers‡. The decision of this court, October 13, 1883, introduces a new epoch and marks a declension of federal power, which has been steady and continuous to the present time. The Baltimore case (49 Md., 217) A. D. 1878, was decided by a state court on a question of state law. In California we have a new constitution and a different distribution of the powers of the government, consequently the decision is inapplicable. We concede to Maryland the right to make and execute her laws, and we claim the right to make, *interpret* and execute our own laws.

It is vain to deny that if Quang Wo, 7 Saw., 531, is held to be correct our case is heavily shadowed by that decision. But in the light of subsequent decision and in view of authorities not brought to the notice of the court in that case, and more recent authorities, will this court follow the reasoning of that case or will they examine it?

Without waiving our demurrer to the first assignment of error we respectfully submit that the following line of decisions show that the error assigned is no error. The court found against the plaintiff on the facts that the order is not "against natural right." Yick Wo and Wo Lee have no natural right to come and burn us in our beds.

But if the court desires to examine this error we deferentially submit that the weight of authority is in our favor as will be seen from the following line of carefully considered cases:

Cases A. to N. inclusive, p. 42, *infra.*

We do not deny the right of every one "to wash and be clean." The order we are examining relates to laundries carried on as a business for business purposes. Large quantities of soiled clothes are

---

* NOTE.—7 Saw., 531. † 6 Saw., 237–442. ‡ 6 Saw., 410.

gathered; some may come from healthy persons, some from sick persons, and some from the dying or the dead. Hot fires may be necessary for this work. May not a large city say this business should be carried on in brick or stone buildings. The risk of fire is too great in the central portions of the city. If there are laundries in wooden buildings worthy of exception by reason of favorable situation we will grant such exceptions in proper cases, but as a rule we require brick or stone laundries. Is not this a proper regulation of a business? It has nothing to do with each individual's right to be clean or to wash their own clothes. Some whites and some chinese comply literally and fully with the law and find no hardship in it. Why not try and get into brick? It will be better for the city and cheaper in the long run for the laundrymen.

B. The 2ND assignment of error is irregular because not raised in the court below. It is insufficient as we have shown on p *ante* and without waiving our demurrer we pass it without argument.

C. The 3D assignment we think is bad in law and in fact. Fairly read, the immediate effect of the order is not to deprive the petitioner, or any other, of property, etc., contrary to art. XIV, U. S. cons. Our supreme court found against plaintiff on the facts, and there is no bill of exceptions to bring up the evidence. The evidence in the record sustains the court below.

D. The 4TH assignment is bad in law and in fact. Any law for the punishment of murder, burglary, polygamy, or any other crime, may be "capable" of being operated and enforced in a discriminating manner. The remedy is to punish the discriminator, and not to set aside the law. Every law is "capable" (if this is) of being so enforced.

E. The 5TH assignment is bad in law and in fact. Were it true that the order is enforced against the chinese only, that would not invalidate the order, because the chinese might be the only offenders.

We have already shown that, owing to the confusion resulting from the successful opposition of the Tung Hing Tong, it was very difficult to know the law relating to laundries in San Francisco. The few white laundrymen have always obeyed the law so far as known to them or to the authorities, and the Tung Hing Tong has always resisted it as may be seen by the reports of this litigation.

The board of supervisors have only granted two permits, and in each case chinese are employed—70 in one place and 40 in the

other. All the whites have been arrested, but not all the chinese, and the courts, the laundrymen (white, yellow, black and brown), the officers, landlords, tenants and customers, are all waiting for the decision in this case; and while waiting for this great decision, and before the law has been enforced at all, can we be charged with partiality in its enforcement?

But if we had been partial, would the remedy be by punishing the partial person, or by setting the law aside? We think that it is clear that the law would stand, but the person guilty of partiality should be punished. See § 1979, R. S. U. S.

The pleadings were *(mutatis mutandis)* the same in both cases, as will appear on inspection of the transcripts.

It is to be regretted that there were not findings of fact (see page 9, *ante*), in both cases; but as they were not, it must be presumed that the findings in both cases were such as would support the judgment. Not such as would support the reasoning of the decision, but such as would support the conclusion. A court may decide correctly for a wrong reason, but in such case the judgment cannot be reversed. The two exhaustive and elaborate opinions which are now under examination in the cases at bar, cannot be read without realizing that the admitted facts led to different conclusions of fact in different courts, although the admissions were substantially the same in both cases. Nevertheless, the same facts led to the same conclusion of law in both courts. How can this court, in the absence of findings, correct this error, if error there has been?

We presume that every allegation in the petition, which we have not expressly admitted, will be disregarded. We have no language to express our abhorrence of persecution of any race of men, on account of color, birth or nationality. We are not concerned with political questions which belong to congress, or administrative questions which belong to the executive department of the government. Our discussion pertains to the police power of the state to adopt or enforce the order under examination.

We think our opponents have shown some decisions which tend to support their contention, and imposed on us the duty of comparing these decisions with those on which we rely. This requires some attention to the order of time in which these decisions were delivered, and we shall examine them in their chronological order:

Baltimore *v.* Radecke, 49 Md., 217; 33 Am. R., 243–5, decided in 1878. (*Vide* Wo Lee, 9 W. C. R., 82–3.)

As to this case, we say that we do not question the right of the state of Maryland to make or administer her laws. This decision was presented to the supreme court of California in Yick Wo, the case at bar, and our court declined to follow the supreme court of Maryland, and adhered to the contrary rule which had long been in force in our state. Ought we to disregard the supreme court of California, and follow the supreme court of Maryland? Can this court reverse the supreme court of California because it refuses to follow the supreme court of Maryland and adheres to its own decisions?

Re Fraser, 54 Cal., 94.

Re Johnson, 62 Cal., 263.

See *re* Guerrero, p.——, *post*, 9 W. C. R., ——, March 16th, 1886.

No disguise will conceal the fact that there is a conflict of authority upon the question we are examining, as will be seen on inspection of a few of the decisions which treat the question at bar.

DECISIONS RESTRAINING THE POLICE POWER OF THE STATE.

DATE.	
1878.	Baltimore *v.* Radecke, 49 Md., 217.
1882.	July. *Re* Quong Wo, 7 Saw., 531.
1886.	Jan. 26. *Re* Wo Lee, 9 W. C. R., 81.
	And other cases cited on page 30 *ante*.

DECISIONS ASSERTING THE POLICE POWER OF THE STATE.

	DATE.	
A	1871.	June. *Re* Ruth, 32 Iowa, 250.
B	1871.	July. Whitten *v.* Covington, 43 Ga., 422.
C	1872.	Nov. State *v.* court, etc., 7 Vroom, N. J., 72.
D	1873.	May. Groesch *v.* state, 42 Ind., 343.
E	1873.	June. State *v.* Ludington, 33 Wis., 107.
F	1875.	Oct. Rohrbacker *v.* Jackson, 51 Miss., 741.
G	1876.	Jany. K. P. R. Co. *v.* Riley, 16 Kan., 576.
H	1879.	Jany. Eureka *v.* Davis, 21 Kan., 579.
I	1881.	July. Pleuler *v.* state, 11 Neb., 547.
J	1883.	Jany. State *v.* Brown, 19 Fla., 564.
K	1885.	Dec. 24. State *v.* Board, Minn., 26 N. W. R., 124.
L	1885.	Dec. 28. *Re* Yick Wo, 8 W. C. R., 548.
M	1886.	Jany. 8th. Com. *v.* Davis, Mass., 4 N. E. R., 578.
N	1886.	Jan. 26. *Re* Wo Lee, 9 W. C. R., 81.
O	1886.	Feby. 26. *Re* Li Protti, Cal., 9 W. C. R., 812.
P	1886.	Mar. 16. *Re* Guerrero, Cal., 9 W. C. R.

We remark that the 14th amendment became a part of the constitution July 28, 1868, and yet we find the states from that time to this asserting and exercising this power.

The importance of the subject is our excuse for presenting the array of authorities. The highest state courts of Iowa, Georgia, New Jersey, Indiana, Wisconsin, Mississippi, Kansas, Nebraska, Florida, Massachusetts, California and Minnesota, have given their reasons for asserting this jurisdiction, which will more fully appear from the following ably argued cases:

SUPREME COURT OF IOWA.

"BECK, J. By sections 1575, 1576 of the revision, any citizen of the state, except hotel-keepers, keepers of saloons, eating-houses, grocery-keepers and confectioners, was permitted to sell intoxicating liquors for mechanical, medicinal, culinary and sacramental purposes, upon presenting to the county judge a certificate of twelve citizens of the township in which he resided, that he was a man of good moral character, and a citizen of the county and state, and executing bond, with sureties, conditioned as therein prescribed. The duty of a person so authorized to sell liquors, and sundry regulations touching the same, are prescribed in these sections.

These provisions are amended by chapter 128 of the acts of the twelfth general assembly, which provides that, upon application being made for the permission, a day shall be fixed for the hearing, a notice thereof be given for the time and in the manner prescribed, and that any resident of the county may, on the day of final hearing, show cause against the allowance of the permission, which "shall be refused unless the county judge shall be fully satisfied that the requirements of the law have in all respects been fully complied with; that the applicant is a person of good moral character; and that, taking into consideration the wants of the locality and the number of permits already granted, such permit would be necessary and proper for the accommodation of the neighborhood."

The application of appellant was rejected, as we gather from the abstract before us, on the ground that he was not a fit and proper person, as contemplated by the law, to receive the permission. No question is made upon this point; counsel concede that appellant "does not possess the standard of morals contemplated by the statute."

But it is argued that the law which limits the granting of permissions of this kind to persons of good moral character is in conflict with the constitution of the state, and therefore void. The validity of no other provision of the statute is attacked.

Counsel bases his argument upon article 1, section 1 of the constitution, which declares that all men are equal and endowed with the right of acquiring, possessing and protecting property; and section 6, of the same article, which forbids the general assembly granting "to any citizen or class of citizens, privileges or immunities, which upon the same terms shall not equally belong to all citizens." He argues that, as intoxicating liquors are property, the general assembly cannot restrict the dealing in them for lawful purposes to any class of citizens, as to citizens of good moral character.

The breadth and design of these constitutional provisions, to secure the equality of all and enjoyment of property by all, is fully understood and as fully conceded. But the equality secured to the citizen cannot be exercised to the danger of the lives and property of others; neither can property be acquired, enjoyed and disposed of to the peril of the lives, health, happiness and property of others. The constitution does not inferfere with the police power of the state to protect the people in their lives, health and property. The state is clothed with the power to prevent injury to these. See constitution, art. 1, § 2. Gunpowder, nitro-glycerine and other explosive agents, are property, yet the state may confine traffic in them to certain classes of persons, and confine their storage to certain localities. Certain poisons are property, but the sale of them may be restricted to certain persons, namely: those having sufficient intelligence to know when they ought to be used, and of sufficient character for prudence to give assurance that these deadly agents will not be carelessly administered. So intoxicating liquors are deemed, by the law, agents that are dangerous to the morals, health and lives of the people, though useful for proper purposes; their sale in the hands of men not of good character would be abused and the people suffer therefrom. A preventive restriction is thrown around their sale, by permitting men of good moral character alone to deal in them. But counsel exclaim: "have not men of bad moral character the same rights as men of good morals?" Undoubtedly all are equal before the law as to the rights of property. But no one has the right to deal in these liquors, so far as his own interests are concerned; but as the wants of the people, for certain lawful purposes, demand that some should be allowed to sell them, the privilege is granted to certain persons, not because they have a right to sell the liquors, but because the wants of the people demand that the sale should be authorized to some extent, and they will be less likely to do injury than others who might be intrusted with the privilege.

The sale of the liquors by all men of good morals is not permitted, and the law is not, therefore, intended, nor does it operate, to secure commerce in intoxicating liquors to all persons of that class. It has been found that the health and lives of the people demand that a few licensed persons be empowered to sell these liquors for lawful purposes, and that all others be forbidden to deal in them. Of those who are authorized, the law requires satisfactory proof of good moral character. In this respect, it differs not from all license laws which bestow privileges upon fit and proper persons making application therefor. These laws have always been sustained.

The authorities cited by counsel are not in conflict with the foregoing views.

In our opinion, the provision of the statute in question is not in conflict with the constitution.

The judgment of the circuit court is affirmed."

Re Ruth. June, 1871. 32 Iowa, 250.

SUPREME COURT OF GEORGIA.

"WARNER, J. This was a mandamus by the petitioner calling on the mayor and council of the city of Covington, to show cause why a license should not be granted to him to retail spirituous liquors within the limits of said city. The city authorities showed for cause why said license should not be granted, that the petitioner had failed to comply with that part of the city ordinance in relation to the issuing of license to retail spirituous liquors in said city, which is as follows: "He shall, before receiving such license, produce the written recommendation of four of his nearest neighbors, each signature to represent a separate and distinct establishment." On hearing the mandamus the court refused to make the same absolute, but dismissed it; whereupon, the petitioner excepted. This was a legal and valid ordinance of the city, under the grant of power conferred by the 13th section of the city charter, and there was no error in the court below in refusing to make the mandamus absolute and dismissing the same. Judgment affirmed."

Whitten *v.* Covington, etc. July, 1871. 43 Ga., 422.

NEW JERSEY ASSERTS HER POLICE POWER.

SUPREME COURT OF NEW JERSEY.

"VAN SYCKEL, J. This application is made to test the constitutionality of what is termed the Chatham local option law.

The provisions of the act (laws, 1871, p. 1470) are substantially that it should be lawful for the persons qualified to vote at the next annual town meeting, to determine by ballot whether thereafter license to sell spirituous liquors should be granted; that if it should appear that a majority of votes were cast for "no license," it should not thereafter be lawful to grant any such license until otherwise decided by a contrary vote at some subsequent town meeting; that from and after the passage of the act it should not be lawful for any person within said township, without a license for that purpose first had, to sell by less measure than one gallon, and any person so selling without license should be adjudged guilty of a misdemeanor; and lastly, that so much and such parts of all acts and parts of acts as are inconsistent with this act be and are repealed.

At the time prescribed by the act, a majority of the legal voters of said township voted "no license."

At the following May term of the Morris common pleas, the relator, by petition, signed and verified as by the act "concerning inns and taverns" is required, applied for a license to keep an inn and tavern in Chatham.

The court having refused to entertain said application on the ground that it had no power to grant it, this court is asked to send its writ of mandamus to the court below, in aid of the applicant's petition.

The local option law is alleged to be in conflict with that article of our state constitution which provides that the legislative power shall be vested in a senate and general assembly.

It must be conceded that this law can have no sanction if it is a delegation of the law-making power to the people of the township.

If the right to declare what the law shall be in one case may be referred to the people, the right to do so may be given in all cases, and thus the legislature may divest itself wholly of the power lodged in it by the fundamental law, until by subsequent legislation it shall be resumed. It is also obvious that it is not competent to delegate to the people the right to say whether an existing law should be repealed or its operation suspended. To say that what is now the law shall not hereafter, or shall not for a specified time be the law, is in effect to declare the law to be otherwise than it now is, and is a clear exercise of the law-making power. The will of the legislature must be expressed in the form of a law by their own act. If it is left to the contingency of a popular vote to pronounce whether it shall take effect, it is not the will of the law-makers, but the voice of their constituents which moulds the rule of action. If the vote is affirmative, it is law; if in the negative, it is not law. The vote makes or defeats the law, and thus the people are permitted unlawfully to resume the right of which they have divested themselves by a written constitution, to declare by their own direct action what shall be law. The cases upon this subject, so far as they assert the principles above stated, have my entire concurrence. Parker *v.* Commonwealth, 6 Barr, 507; Rice *v.* Foster, 4 Harrington, 479; Maize *v.* State, 4 Ind., 342; State *v.* Parker, 26 Vt., 357; Santo *v.* State, 2 Iowa, 165; Paterson *v.* Society, etc., 4 Zab , 385.

The test will be whether this enactment, when it passed from the hands of the law-giver, had taken the form of a complete law. It denounces as a misdemeanor the selling of liquor without license; so far it is positive and free from any contingency.

It left to the popular vote to determine, not whether it should be lawful to sell without license, but whether the contingency should arise under which license might be granted.

It was not submitted to the voters of Chatham to say whether there should be a majority vote in favor of license before license could be granted; the law as framed declares that there shall be such majority vote. The operations of the first and second sections of the act "concerning inns and taverns" is not suspended by the declaration of the popular will, but the act itself modifies those sections, and makes it a condition of granting license that there shall be a majority vote.

It is the law which makes the majority vote necessary, and not the voice of the people.

Whether the vote is aye or no, the law at all times is the same, and requires the majority vote as a condition precedent to the granting of license.

If a supplement had been passed requiring, instead of twelve reputable freeholders, the signatures of a majority of the legal voters of the township to the applicant's petition, would its constitutionality be challenged?

Upon principle it makes no difference whether the recommendation of the majority is expressed by ballot at a town meeting or in the form of a certificate.

It is competent for the legislature to prescribe the mode in which it shall be done.

Under the general law, the applicant could not call into exercise the power of the court until twelve freeholders petitioned in the manner therein directed. Under the special act in question an additional restriction is imposed, but it is imposed by the law itself and not by the people.

If the twelve freeholders under the old law do not certify, the court is restrained from acting; if they do certify, the court can exercise its discretion. So if the majority do not vote for license, the power of the court cannot be invoked; if they do vote for license, it may.

If the twelve freeholders shall not deem it conducive to the public good the privilege is denied, so if the majority shall regard it as inimical to the public welfare to permit the retail trade, the sale must abide under the penalty denounced by the law. The only difference is that under the special act the majority express their judgment as to all applications in gross, while under the general law twelve freeholders act upon them in detail.

The fact that they vote "no license" does not make the law one way, or that they vote "license" the other way.

The vote of the people may be changed, but the rule that a majority vote shall be essential remains unaltered.

The legislature has pronounced what the law shall be, and it cannot be and is not abrogated, changed or altered by the popular expression.

The leading cases of Rice *v.* Foster and Parker *v.* Commonwealth are distinguishable in principle from this.

In those cases, the prohibition and penalty were not denounced by the law itself, but by the popular vote. The selling of liquor was not pronounced to be unlawful; it was referred to the people to determine whether it should be restrained.

So in the law proposed to be passed at the last session of our legislature, "the offense defined by the act could not be committed unless the voters of the town determined that licenses should not be granted."

But if this is construed as an act authorizing the township by a majority vote to prohibit the retail traffic in liquors, it may still be supported.

The right of the legislature to grant the power of local government to municipalities is conceded, and it is immaterial whether the enactment conferring it is regarded as a declaration of the supreme legislative will and strictly a law, or merely as a concession of a grant by the legislature, as the representative of the sovereignty of the people.

Such legislation has become so woven into our system of government, and its exercise as an appropriate function of the lawgiver has passed so long unchallenged, and has been so repeatedly recognized by the courts, that it cannot be permitted now to be called in question.

Under the authority to establish police regulations, municipal corporations may be invested with power to make ordinances to

promote the health or contribute to the safety of the community.

Noxious trades may be restrained, the storage of highly inflammable or dangerous materials may be prohibited, disorderly houses may be suppressed, and sports, exhibitions and public performances regulated, restrained or prohibited.

It would not be pretended that authority could be delegated to the corporate body to pronounce how real estate should descend, or personal property be distributed within the city limits.

In almost every city charter the right to regulate or restrain the sale of intoxicating liquors is expressly conferred, and it could be done only upon the theory that it is a police regulation, and not strictly an exercise of the law-making power.

This species of property is clearly within the same rule, which permits the corporate body under legislative sanction to determine for itself whether gunpowder or nitro-glycerine may be manufactured or stored within its limits.

While alcoholic stimulants are recognized as property and are entitled to the protection of the law, ownership in them is subject to such restraints as are demanded by the highest considerations of public expediency. Such enactments are regarded as police regulations, established for the prevention of pauperism and crime, for the abatement of nuisances, and the promotion of public health and safety. They are a just restraint of an injurious use of property, which the legislature has authority to impose, and the extent to which such interference may be carried must rest exclusively in legislative wisdom where it is not controlled by fundamental law.

It is a settled principle, essential to the right of self-preservation in every organized community, that however absolute may be the owner's title to his property, he holds it under the implied condition "that its use shall not work injury to the equal enjoyment and safety of others, who have an equal right to the enjoyment of their property, nor be injurious to the community."

Rights of property are subject to such limitations as are demanded by the common welfare of society, and it is within the range and scope of legislative action to declare what general regulations shall be deemed expedient.

If, therefore, the legislature shall consider the retail of ardent spirits injurious to citizens, or productive of idleness and vice, it may provide for its total suppression. Such inhibition is justified only as a police regulation, and its legality has been recognized in well considered cases.

It is neither in conflict with the power of congress over subjects within its exclusive jurisdiction, nor with any provisions of our state constitution, nor with general fundamental principles. Cooley on cons. limitations, p. 583, and cases there referred to; Thurlow *v.* Massachusetts, 5 How., 504.

It is not necessary to amplify discussion on this point, or to criticise the cases in detail. The view here taken underlies the whole subject of police regulations, and cannot logically be narrowed in its application.

An examination of the cases will show that some laws of this character have failed to receive the approval of the courts because they invaded the right of the citizen to be secure against unreasonable searches, or denied to him a fair trial before condemnation of his property.

It necessarily results that municipal corporations may derive the power to interdict the sale of intoxicating drinks from the same source to which they owe their authority to regulate it. The grant of power to prohibit the sale is no more the delegation of a right to make law than the grant of authority to regulate it.

Assuming this proposition, how may such authority be exercised by the corporate body?

Obviously, the only limitation must be contained in the terms of the grant itself, in the absence of any constitutional restraint.

It is wholly immaterial how the power is exercised so long as it is in the mode appointed by the superior. In establishing the local government, the power may, at the discretion of the legislature, be lodged in the people to make rules for the regulation of their internal police by their direct vote in mass meeting assembled, or through designated officials by themselves duly elected. It would therefore be within the province of the legislature to confer upon a city the right, by a majority vote of its inhabitants, to pass ordinances for the regulation or suppression of the retail trade in ardent spirits.

This leads to the question whether Chatham township was in a position to receive such a measure of the power of local government?

The inhabitants of the several townships in this state are incorporated by a general law. They have heretofore without question exercised many powers through a direct vote of the people. They determine how the poor shall be kept, how much money shall be raised for roads, and how much, if any, for school purposes, and I know of no reason why they may not be vested with the same powers which are or could be granted to municipal corporations, including the one which has given rise to this contest.

Whether these laws are wisely framed to subserve their purpose is not to be determined by the court, but must be referred to that branch of our government which has the exclusive right to enact or repeal them.

Regarding the established rule, that only in clear cases of excess should the action of the legislature be arrested by judicial interference, I am of opinion that the mandatory writ should be denied.

Justices Dalrimple and Depue concurred."

State *v.* Court, etc. Nov., 1872. 7 Vroom (N. J.), 72.

SUPREME COURT OF INDIANA.

DOWNEY, J. This is an indictment against the appellant, in which he is charged with selling intoxicating liquor, and suffering the same to be drunk in the building and upon the premises where the same was sold, without a permit, in violation of the act of February 27th, 1873, entitled "an act to regulate the sale of intoxicating liquors, to provide against evils resulting from any sale thereof, to furnish remedies for damages suffered by any person in consequence of such sale, prescribing penalties, to repeal all laws contravening the provisions of this act, and declaring an emergency." Acts 1873, p. 151, *et seq.*

The defendant moved the court to quash the indictment, and his motion was overruled. He then upon arraignment pleaded not guilty, and the issue having been tried by the court, without a jury, he was found guilty, and a fine of ten dollars assessed against him. Motions made by him for a new trial, and in arrest of judgment, were overruled, and final judgment was rendered against him. Exceptions were duly taken by him to the several rulings of the court, and he has here assigned these rulings as errors. The avowed object of the appeal is to obtain the judgment of this court upon the constitutionality of the act on which the indictment is founded. It is not denied by counsel for the appellant that the facts alleged in the indictment were fully proved by the evidence on the trial of the cause, and counsel for the state concede that the record is such as fairly presents to this court the questions, a decision of which is desired. The questions involved have been argued, both orally and in printed briefs, by the distinguished counsel engaged in the cause. The objections made by counsel for the appellant do not extend to the whole act, but are confined to certain features or parts of it. In the language of their brief, "the only portions of the act that are necessarily brought to the attention of the court by this record are those prohibiting such sales without a permit and those relating to the granting of permits."

Having bestowed upon the questions presented the consideration which their magnitude and importance demands, we proceed to state our conclusions with some of the reasons which have led us to such conclusions.

The law in question is, in many essential particulars, very different from any other law on the subject, which has heretofore been in force in the state. It contains many important provisions which have not before been found in any law in this state on that subject. For this reason, and in order that our decision and the law may be found together, we will state a little more fully than we otherwise would do, the provisions of the act. It will thus more readily be seen what features or parts of the act have been passed upon by this decision and what have not been considered. The first section of the act provides, "that it shall be unlawful for any person or persons, by himself or agent, to sell, barter, or give away for any purpose of gain, to any person whomsoever, any intoxicating liquors to be drunk in, upon, or about the building or premises where the liquor is sold, bartered, or given away,

or in any room, building, or premises adjoining to or connected with the place where the liquor is sold, bartered, or given away for the purpose of gain, until such person or persons shall have obtained a permit therefor from the board of commissioners of the county where he resides, as hereinafter provided."

The second section requires that "any person desiring a permit to sell intoxicating liquors to be drunk on the premises, shall file in the office of the auditor of the proper county, not less than twenty days before the first day of the term of any regular session of the board of commissioners of such county, a petition in writing, stating therein the building or number, street, ward or township wherein the permission is asked to be granted, praying for such permit, and certifying that the applicant is a resident voter of such county, and a citizen of the state of Indiana, and that he is a proper person to have and receive such permit; which petition shall be signed by the applicant, and also by a majority of the legal voters resident in the ward, if it be in a city or town, if it be an incorporated town, or township wherein the applicant proposes to sell intoxicating liquors; such petition shall be kept on file by the auditor until the next ensuing regular session of the board of commissioners, when it shall be presented to the board for their action. The board shall examine such petition, and if satisfied the same is in proper form, and that it has been signed as hereinbefore required, shall direct a permit to be issued under the hand and seal of said auditor, and delivered to the person named in such permit, upon his complying with the provisions of this act and paying the costs of filing and recording said petition and costs of issuing said permit."

By the third section it is required that "before the granting of a permit by the board of commissioners, the applicant shall cause to be executed and properly acknowledged before an officer authorized to take acknowledgment of deeds, a bond payable to the state of Indiana, the sum of three thousand dollars, with good freehold security thereon of not less than two persons, to be approved by the board of commissioners, and conditioned for the payment of any and all fines, penalties and forfeitures incurred by reason of the violation of any of the provisions of this act, and conditioned further, that the principal and sureties therein named shall be jointly and severally liable, and shall pay to any person or persons, any and all damages which shall in any manner be suffered by or inflicted upon any such person or persons, either in person or property, or means of support, by reason of any sale or sales of intoxicating liquors to any person, by the person receiving such permit or by any of his agents or employees. Separate suits may be brought on said bond by the person or persons injured, but the aggregate amount recovered thereon shall not exceed the said sum of three thousand dollars, and in case the amount of said bond shall be exhausted by recoveries thereon, a new bond in the same penalty and with like sureties shall be filed within ten days, and in default thereof said permit shall be deemed to be revoked. Such bond, after its approval by the board of commissioners, shall be filed in the office of the auditor

of the county, and shall be recorded by such auditor forthwith in a book prepared for that purpose, and shall there remain for the use of the state of Indiana, and for the use of any person or persons suffering any damage as hereinbefore set forth. Such bond may be sued and recovered upon in any court having civil jurisdiction in the county (except justices' courts) by or for the use of any person or persons, or their legal representatives, who may be injured or damaged by reason of any sale or sales of intoxicating liquors by the person receiving the permit or by any of his agents or employees. The record of the bond or a copy thereof, duly certified by such auditor, shall be admissible in evidence in any suit on such bond, and shall have the same force and effect as the original bond would have if offered in evidence."

The fourth section declares, that "the whole number of votes cast for candidates for congress at the last preceding congressional election in the township, and the whole number of votes cast for councilman or trustee in any ward or town, at the last preceding municipal election in any city or town in which the applicant for permit desires to sell said intoxicating liquors, shall be deemed to be the whole number of legal voters of such ward, town or township, a majority of whose names shall be signed to the petition of such applicant;" and this section also provides a punishment for any person not a legal voter of the ward, town, or township, who may sign such petition.

By the fifth section it is provided, that the permit shall be granted for one year; that the auditor shall furnish to the party to whom it has been granted a copy of the order, which shall show the date of the commencement and the expiration thereof. This copy is required, by this section, to be hung up in a conspicuous place in the room where the liquors are sold, where it can be seen and read, at all times, by any person desiring to do so. This section also provides, that, should any person holding a permit be convicted of a violation of any of the provisions of the act, such conviction shall work a forfeiture of his permit, and of all rights thereunder, and that no permit shall thereafter be granted to such person, before the expiration of five years from the date of such conviction.

The sixth section denounces a penalty against any person who, by himself or agent, shall sell, barter, or give intoxicating liquors to any minor, or to any person intoxicated, or to any person who is in the habit of getting intoxicated.

All places where intoxicating liquor is sold, in violation of the act, are, by the seventh section, to be taken, held, and are declared to be common nuisances; and all rooms, taverns, eating houses, bazaars, restaurants, drug stores, groceries, coffee houses, cellars, or other places of public resort, where intoxicating liquors are sold in violation of this act, shall be shut up and abated as public nuisances, upon the conviction of the keeper thereof, who is to be punished as afterward provided in the act.

In the eighth section it is enacted that any person who shall, by the sale of intoxicating liquors, with or without a permit, cause

the intoxication, in whole or in part, of any other person, shall be liable for, and be compelled to pay, a reasonable compensation to any person who may take charge of and provide for such intoxicated person, for every day he or she is so cared for, which sum may be recovered in an action of debt before any court having competent jurisdiction.

The ninth section punishes those who are found in a state of intoxication, and requires them to give information as to the person or persons from whom the liquor, in whole or in part, was obtained, under penalty of imprisonment in the county jail.

According to the tenth section, a permit does not authorize selling on Sunday, upon the day of any state, county, township, or municipal election in the township, town, or city, where the election may be held, upon christmas day, upon the fourth of July, upon any thanksgiving day, or upon any public holiday, or between the hours of nine o'clock P.M., and six o'clock A.M.; and to sell in violation of this section is made penal.

The eleventh section declares, that "the bartering or giving away of intoxicating liquors, or other shift or device to evade the provisions of this act, by any person or persons keeping liquors for sale, or by his agent or employee, at the place where the same are kept for sale, shall be deemed and held to be an unlawful selling or giving away for the purpose of gain within the provisions of the act."

The twelfth section gives, in addition to the remedy given by section eight, to every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual, or otherwise, of any person, a right of action in his or her own name, severally or jointly against any person or persons who shall, by selling, bartering, or giving intoxicating liquors, have caused the intoxication, in whole or in part, of such person, and declares that any person or persons owning, renting, leasing, or permitting the occupation of any building or premises, and having knowledge that intoxicating liquor is to be sold therein, or having leased the same for other purposes shall knowingly permit therein the sale of intoxicating liquor, or who, having been informed that intoxicating liquor is sold therein, that has caused, in whole or in part, the intoxication of any person, who shall not immediately, after being so informed, take legal steps in good faith to dispossess such tenant or lessee, shall be liable jointly with the person selling, bartering, or giving away intoxicating liquors as aforesaid, to any person or persons injured, for all damages, and for exemplary damages. It is provided, however, that execution on any such judgment shall first be levied on the property of the person selling, etc., such liquors. By this section a married woman has the same right to bring suit, and to control the same and the amount recovered, as a *feme sole*, and all damages recovered by a minor are to be paid to the minor or to his or her parent, guardian, or next friend, as the court may direct. The unlawful sale, etc., of liquor by a tenant works a forfeiture of all his rights under the lease or contract by which the premises are held.

This section also declares that all suits for damages under the act may be by any appropriate action in any of the courts in this state having competent jurisdiction, and declares that all judgments recovered under the provisions of the act may be enforced without any relief from valuation laws.

Section thirteen gives the right of action to the township trustee under certain circumstances.

The fourteenth section, which is the section on which the indictment in this case is founded, declares, that "for every violation of the provisions of the first and sixth sections of the act, the person so offending shall forfeit and pay a fine of not less than ten dollars nor more than fifty dollars, or be imprisoned in the jail of the county not less than ten nor more than thirty days;" and for every violation of the seventh section, a fine of not less than twenty nor more than fifty dollars, and the place so kept shall be shut up and abated as a common nuisance, by order of the court before which the conviction is had. The fifteenth, sixteenth, eighteenth, and nineteenth sections of the act relate to proceedings under the act, and the force and effect of the judgment rendered. The seventeenth section enacts, that it shall be unlawful for any person to buy for or furnish to any person who is at the time intoxicated, or in the habit of getting intoxicated, or to buy for or furnish to any minor, to be be drunk by such minor, any intoxicating liquor, and declares that any person or persons violating that section of the act shall be fined not less than five nor more than fifty dollars. The twentieth section repeals all laws and parts of laws conflicting with this act or with any of its provisions, etc. The twenty-first section of the act declares that an emergency exists for the immediate taking effect of the act, and that it shall, therefore, be in force from and after its passage, except in so far as it relates to those who hold a license under the existing laws of the state, and as to them immediately after the expiration thereof.

The question as to the constitutionality or the unconstitutionality of an act of the legislature, when presented to the court, is always regarded as one of great delicacy and importance. This results from a consideration of the deference due to the other departments of the government, and from the fact that in those cases where the question is as to the conflict of the law with the state constitution, as is the case here, the decision of the court is final. Members of the general assembly are solemnly sworn to support the constitution of the state, and it is their imperative duty to pass no law which, in any of its parts, contravenes its provisions. When an act has secured the requisite votes and has passed the two houses of the general assembly, it must undergo the scrutiny of the executive, who is equally with the legislature bound to forbid its becoming a law, if, in his opinion, it is in violation of the constitution of the state. Hence, it has always been the language of this court, that an act of the legislature, duly passed and approved by the Governor, is not to be declared invalid, unless it be clearly, palpably and plainly in conflict with the constitution. The Lafayette, etc., railroad co. *v.* Geiger, 34

Ind., 185, and cases cited. We need not stop to refer to other authorities on this point, but we cannot resist the inclination to repeat, in this connection, the appropriate language of one whose talents and labors have been an honor to the bench of this court: "The constitution is paramount to any statute, and whenever the two are in conflict the latter must be held void. But where it is not clear that such conflict exists, the court must not undertake to annul the statute. This rule is well settled, and it is founded in unquestionable wisdom. The apprehension sometimes, though rarely, expressed, that this rule is vicious, and constantly tends towards the destruction of popular liberty, by gradually destroying the constitutional limitations of legislative power, results from a failure to comprehend the character of our forms of government, and the fundamental basis upon which they rest. The legislature is peculiarly under the control of the popular will. It is liable to be changed, at short intervals, by elections. Its errors can, therefore, be quickly cured. The courts are more remote from the reach of the people. If we, by following our doubts, in the absence of clear convictions, shall abridge the just authority of the legislature, there is no remedy for six years. Thus, to whatever extent this court might err, in denying the rightful authority of the law-making department, we would chain that authority, for a long period, at our feet. It is better and safer, therefore, that the judiciary, if err it must, should not err in that direction. If either department of the goverment may slightly overstep the limits of its constitutional powers, it should be that one whose official life shall soonest end. It has the least motive to usurp power not given, and the people can sooner relieve themselves of its mistakes. Herein is a sufficient reason that the courts should never strike down a statute, unless its conflict with the constitution is clear. Then, too, the judiciary ought to accord to the legislature as much purity of purpose as it would claim for itself, as honest a desire to obey the constitution, and also, a high capacity to judge of its meaning. Hence, its action is entitled to a respect which should beget caution in attempting to set it aside. This, with that corresponding caution of the legislature, in the exercise of doubtful powers, which the oath of office naturally excites in conscientious men, would render the judicial sentence of nullity upon legislative action as rare a thing as it ought to be, and secure that harmonious co-operation of the two departments, and that independence of both, which are essential to good government." Frazier, j., in Brown *v.* Buzan, 24 Ind., 194.

With the expediency of the law, if there is any question as to that, we have nothing to do. That is a question first for the legislator, and next for the executive. That consideration may control the vote of the former, or the veto or approval of the latter, but we can decide nothing with reference to it. Our duty is to decide whether or not there is a plain violation of the constitution by the features or portions of the act in question. From the discharge of this duty we have no disposition to shrink.

Counsel for appellant say: "The propositions that we desire to

submit to the judgment of the court are these—that this act provides for a direct intervention of the people in the making and in the executing of a law; that the taking effect of the act is made to depend upon popular choice; that it is local and special, when it should be general and uniform in operation; and that it therefore violates all those several provisions of the constitution, in which the organic ideas upon these subjects are embodied." The first question to be decided is this: does the act in question commit legislative power to the people? It is urged by counsel for the appellant that it does, and that it is therefore in violation of section one of article IV of the constitution, which provides that the legislative authority of the state shall be vested in the general assembly, which shall consist of a senate and house of representatives. It is quite clear, we think, as a legal proposition, that the legislative authority is incapable of delegation; that it cannot be conferred by the legislature upon any other body, or upon any person or persons, is a proposition not questioned. Barto *v.* Himrod, 4 Seld., 483; Parker *v.* commonwealth, 6 Pa. st., 507; Thorne *v.* Cramer, 15 Barb, 112; Bradley *v.* Baxter, 15 Barb., 122; Rice *v.* Foster, 4 Harring, Del., 479; Geebrick *v.* the state, 5 Iowa, 491; the state *v.* Weir, 33 Iowa, 134. Yet it would, perhaps, not be seriously disputed that the legislature may confer, and in fact has conferred, an authority, which if not legislative much resembles legislative authority, upon municipal corporations, for purposes of local self government. The people *v.* Collins, 3 Mich., 343; 1 G. & H., 223, sec. 35; Brinkmeyer *v.* the city of Evansville, 29 Ind., 187; the mayor, etc., *v.* Roberts, 34 Ind., 471. The material question here is, does the act in question confer upon the people or a portion of the people legislative authority? The ground taken is, that the law is not in force in any township, town, or ward of a city, until the requisite number of voters have signed a petition, and that it is the act of such voters in signing the petition which makes the law. In our judgment, this position is untenable. We cannot regard the act as conferring upon the petitioners legislative authority in any sense of these terms. It might as well be said that the law which authorizes the laying out of a public highway by authority of the county commissions, upon the petition of a designated number of persons, was unconstitutional, because it conferred upon such petitioners legislative authority. Had the question been submitted to the people to determine, by vote or by petition, whether the law should take effect or not, or the time when it should take effect, as in some of the cases to which we have referred, there would have been some ground for the objection. But here the law was enacted in the usual form of enacting laws, and it is declared by the legislature that it shall be in force from and after its passage, etc. The petition of an applicant for a permit, aided by his co-petitioners, so far from being an exercise of legislative authority, really assumes that the law has been enacted and is already in force, or otherwise there would be no authority for such application and petition. The case of Maize *v.* the state, 4 Ind., 342, is cited as an authority in support of all the objections urged against this

law. We do not so regard it. In our opinion, the act, the constitutionality of which was in question in that case, was so different from the act now in question, that that case is not an authority upon any point in this case. Therefore, while we need not approve the decision in that case, it is not necessary that we should overrule it in deciding this case. It may be remarked, however, that there are several cases, and among them Clarke *v.* the city of Rochester, 24 Barb., 446, and 28 N. Y., 605, the case in the supreme court of Pennsylvania of Loch, Chicago legal news, vol. 5, p. 372, Bancroft *v.* Dumas, 21 Vt., 456, and the more recent case of the state, *ex rel.* Sanford *v.* the Morris common pleas, in the supreme court of New Jersey, 12 am. law reg., 32, where legislation similar to the statute of 1853, which was in question in the Maize case, has been held to be constitutional and valid. Under the law in question in the Maize case, the voters in each township determined the question whethor any licenses should be granted or not, by a vote, once in each year. When the vote was in favor of license, any one could obtain a license by filing a bond with security as required by the act. If the vote was against license, no one could obtain a license during the year. The question as to the qualifications or fitness of the applicant to be intrusted with a license did not enter into consideration in any view of the case.

Under the present law, however, the vote at a preceding election is assumed as fixing the number of voters, without any reference to the fact that all the voters never vote at the same election, and a number equal to a majority of that number must petition for the granting of each permit. Thus the qualifications and fitness of each person, as well as the wish of the petitioners for the establishment of the business in their neighborhood, are at once settled by the voice of those who are most intimately concerned. If they do not thus open the door to the traffic, the law provides that, so far as that applicant is concerned, it shall remain closed. This is a species of self-government which by the law is placed in the hands of the people to be exercised by a majority of them according as they may judge to be for their best interest It is believed that the privilege of retailing intoxicating liquors has never, under any law which has ever been enacted in the state, been granted unconditionally. That the applicant should comply with certain conditions, such as the presentation of a petition signed by a designated number of persons, make proof of his fitness to have a license, or execute a bond, etc., has been a feature of every law which has ever been in force in this state. To comply with such condition has not been heretofore supposed to be an exercise of legislative authority.

The next objection to the act is, that it vests administrative power in the people. This position is in conflict with the preceding, for the same act can not be legislative and at the same time administrative in its character, nor can any person charged with official duties of the one class exercise any of the duties of a person of the other class, except as expressly provided in the constitution. The administrative is included in the executive depart-

ment of the government. Art. 3, sec. 1. Looking at the sixth article of the constitution, which relates to administrative officers and their functions, we find that it embraces the secretary, auditor, and treasurer of state, and certain county and township officers. It also provides the term during which such officers shall hold, their place of residence, etc. The last section states that the general assembly may confer upon the board doing county business in the several counties powers of a local administrative character. We are unable to see any ground upon which it can be maintained that the act by which the petitioners, who recommend the applicant and ask that a permit may be granted to him, can be regarded as an administrative act. So far as the board of commissioners of the county is authorized by the act to hear and decide the questions which may arise upon the presentation of the petition, there can be no question, we think, as to their power to do so, since the constitution expressly authorizes the legislature to confer such powers upon them.

The third and last objection to the act is, that it is local and not general in its operation. This objection goes to the form and quality of the law, irrespective of the manner of its enactment. The following provisions of the constitution are cited as those which are violated by this law: the portion of sec. XXII of article IV which reads as follows: "The general assembly shall not pass local or special laws, in any of the following enumerated cases; that is to say, * * * for the punishment of crimes and misdemeanors;" also section XXIII of the same article, which reads as follows: "In all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state." Is the act in question, or the parts or features thereof which are in question, general and of uniform operation throughout the state? We think the act is general. It is in force and operation in all parts of the state. It is only in a qualified sense that any law can be said to be of uniform operation throughout the state. A law for the punishment of crime, the provisions of which are alike applicable to all parts of the state, must necessarily lack uniformity in one sense of its operation, not only as to persons but also as to localities. It operates in those places where its provisions are violated and upon those persons who transgress them. Under the same circumstance and conditions its operation is uniform. The law which affords civil remedies is uniform in its provisions, and under the like circumstances is uniform in its operation throughout the state. It is not required that every man shall resort to that remedy, or that in each locality there shall be the same number or any number of persons who shall resort to the remedy, in order to make the law uniform in its operation in the sense in which the terms are used in the constitution. Such is the case under all circumstances when one or more persons are by law required to do some act or acts, upon or in consequence of which the law is to operate. Smith *v.* Doggett, 14 Ind., 442. It cannot be held that the framers of the constitution intended that the operation of laws throughout the state

should be uniform in any other sense than that their operation should be the same in all parts of the state under the same circumstances and conditions. In the case of Maize *v.* the state, *supra*, the court having come to the conclusion that it was the vote of the people which made the law, and seeing that in one township the vote would be for license, and in another it would be against license, very naturally, whether rightfully or not, came to the conclusion that the law would thus be in force in some townships and not in others, and therefore local and special in its character and in violation of the constitution. That state of things can never exist under the present law. It is true that if no man will apply for a permit in any township, town, or ward, or if some one is disposed to apply and he cannot command the necessary number of vouchers to sign his petition, there can be no shop in that locality, while at the same time there may be in an adjoining township, town, or ward one or many of such establishments. So, too, there may be what some may regard as a want of uniformity in the same township, town, or ward. A may, on account of his supposed superior fitness for the business, the location of his place of business, or for some other reason, readily obtain the required endorsement, while B, C, and D, for the lack of the supposed qualifications, advantage of location, or other reasons, may be wholly unable to comply with the act in this respect. One man may be able to give the bond and securities required by the act, while another or others may be wholly unable to do so. Does this destroy the uniformity of operation of the act in either of the cases supposed? We think it does not. It would not be difficult to refer to statutes which in principle can not be readily distinguished from the law in question in this case. Many of them are mentioned in the brief of counsel for the appellee. But we will not extend this opinion by a reference to them. In our opinion, the law is not justly liable to any of the objections urged against it.

The judgment is affirmed, with costs.

Groesch v. the state, May, 1873. 42 Ind., 547.

SUPREME COURT OF WISCONSIN.

"DIXON, C. J. Counsel for the respondent frankly concede the constitutional power of the legislature to entirely prohibit the selling or giving away of ardent or intoxicating liquors or spirits to be used as a beverage, and attack only certain provisions of the act as being inconsistent with the authority to sell conferred, and repugnant to the constitutional rights of the citizen engaged in an authorized and lawful traffic and business. The point thus yielded, and as to which there would seem to be little room for controversy at the present day, of the general power of the legislature over the subject acted upon, not only very much narrows the field of contest and investigation, but, as it appears to us, also takes away all grounds of constitutional support for the objection specially urged against particular clauses and portions of the act. Assuming the general power of the legislature over the subject to the extent of prohibiting entirely the traffic in intoxicating liquors or drinks, necessarily involves, as it seems to us, the admission of the utmost limit of legislative discretion in prescribing the conditions of sale, and establishing the liabilities, both civil and criminal, of persons engaged in the trade, in case the legislature sees fit in any manner or under any circumstances of restriction or responsibility to authorize such sale or trade. The law being prospective only in its operation, the legislative power to prohibit all sales must carry with it, as it seems to us, that of declaring the precise terms and conditions upon which any particular sale may take place. This would seem to be so by the familiar principle upon which the greater is always said to include the less. Possessed of the power of absolute prohibition under the constitution, it seems to follow that any relaxation from a plenary exercise of such power, or qualified or conditional enactment by the legislature by which license to sell may be obtained in the way and subject to the liabilities imposed by the act, cannot be an encroachment of legislative authority, unless indeed the legislature should transcend some settled principle of fundamental law, respecting the trial or mode of prosecution or punishment of the party charged with an infraction of the provisions of the act, or with having incurred some liability under it. Acting in obedience to those fundamental principles, in accordance with which the guilt or liability of the party charged must first be ascertained and established, and the judgment of the law rendered against him, it seems competent for the legislature to attach such consequences, civil or criminal, to the mere act of sale, as it pleases, even when such sale is made in pursuance of an authority of the legislature, qualifiedly given for that purpose. *Empowered to prohibit entirely, the legislature may license sub modo, or conditionally only. It may affect the licensee with such restraints, conditions and responsibilities as it pleases, growing out of the act of sale. It may visit him with such consequences as it sees fit, proceeding from the same act. It may couple the license with conditions so oppressive, burdensome and unjust that no citizen can afford to apply for or accept the privilege and engage in the business, and thus the act, though nominally otherwise, may amount to a prohibitory law. These conclusions seem unavoidably to flow from*

the position, admitted or not denied, that the legislature possesses the unqualified power of prohibition. The legislature may not take away the right of trial by jury, or of proceeding by due process of law to ascertain the fact of violation, or of liability incurred. It may not require the accused to plead guilty, to confess judgment or to give evidence against himself. Neither may it create any arbitrary or violent presumption of guilt upon facts equally or more consistent with innocence. It may not change the rules of evidence, or the burden of proof established according to the principles of the common law, and secured and made perpetual by the constitution; nor destroy vested rights, nor punish one man for the delinquencies or misconduct of another, nor, without his consent, make him answerable in damages for the injurious consequences of the acts of another, in which he had no participation, or with which he was wholly disconnected. These and other like things the legislature may not do; but with respect to the act of sale, over which the power of legislation is conceded to be limited, and in respect to the responsibility which shall attach to the doing of that act or the conditions under which it may be done, the way seems open for the legislature to enact whatsoever it pleases. As already more than once observed, this conclusion seems clearly to result from the unrestricted and arbitrary nature of the discretion vested in the legislature in the exercise of what is termed the police power of the state, which is said to be a right to regulate all such matters, found in the first principles of good government and self-protection. The legislature may say to all citizens and persons within the state, that they shall not sell, give away or traffic in at all, as a beverage; or it may say they may do so, being responsible for all the injurious consequences of their acts, which consequences are pointed out and defined by previous law. The power of the legislature in this respect is like that which it possesses in creating and conferring rights and franchises upon a corporation, which mu t be such, and such only, as it prescribes. It may declare, for example, that a railway company applying for a franchise, shall be an unqualified insurer of the safety of all goods entrusted to its care. Fire, though a very useful, is at the same time a very dangerous element, and the legislature may declare, as it has done in Massachusetts and several other states, that any railroad corporation shall be absolutely responsible in damages for any injury done to any building or other property, by fire communicated by a locomotive engine of such railroad corporation. Ross v. Railroad Co., 6 Allen, 87.

And herein, as this court conceives, consists the chief defect and fallacy of the position assumed and argued with so much ingenuity and research by the learned counsel for the respondent. They forget, as it appears to us, that the subject with which we are dealing is not one of those pertaining to the primary and fundamental rights of the citizen, and as to which no unlimited control has been vested in the legislature. They seem to overlook this principal ground of distinction, and argue as if the action of the legislature was an infringement of the natural and inalienable

rights of the citizen, declared and guaranteed by the constitution, instead of the exercise of a discretionary power against which no limit has been set by that instrument. *And this, we think, is the very turning point of the controversy, namely, that the legislature may grant or withhold authority to sell at its pleasure, and, granting such authority, it is held by the licensee at the mere pleasure or grace of the body granting it. It is held by him, not as a matter of primary and absolute right, but as a favor, which, like all favors, must be received upon such terms and conditions, and subject to such burdens and inconveniences as the donor thinks proper to impose, and the donee elects to accept.* Unlike other trades and employments which it is the right of the citizen to pursue, undisturbed by arbitrary legislative interference and control, the person who engages in this, must, within the limitations above indicated, do so subject to such disadvantages and restraints as may be prescribed by the law-making power which authorizes it.

It is fallacious, therefore, to argue from the incompetency of the legislature, in other cases, that there exists no legislative power to make harsh and unjust discriminations, or to enact inequitable and oppressive conditions, upon a subject like this. Conceding that the operation of the law will be what counsel say, and that their criticisms of its provisions are well founded and true, still these do not annul the law or affect its validity, in a constitutional sense, but only render it "void in its *obligatory quality on the mind*, and therefore determine it as the proper object of abrogation and repeal, so far as regards its civil existence." They are proper arguments to be addressed to the legislature, but not to this court. This court must accept the law, as counsel must, as all citizens must, just as the legislature has deemed expedient to enact it. Speaking in the sense of that "immovable principle" of natural justice which should govern all legislative bodies in their enactments, but not in that restricted sense of the constitution which leads to the disregard or abrogation of the expressed will of the legislature by any other than the legislative body itself, it has been observed by one of the greatest statesmen and wisest political philosophers of modern times, that "in reality there are two, and only two, foundations of law; and they are both of them conditions without which nothing can give it any force—I mean equity and utility. With respect to the former, it grows out of the great rule of equality, which is grounded upon our common nature, and which Philo, with propriety and beauty, calls the mother of justice. All human laws are, properly speaking, only declaratory; they may alter the mode and application, but have no power over the substance of original justice. * * * Law is a mode of human action respecting society, and must be governed by the same rules of equity which govern every private action." Burke's works, vol. 6, p. 22.

If, therefore, the legislature has exceeded the limits of natural equity by the statute in question, in imposing conditions and declaring liabilities for acts done under the license granted; if it has made the licensee liable for damages which are remote or consequential, when by the rules of the common law and the princi-

ples of natural justice, he should only be held responsible for those that are proximate or direct; if it has made him answerable in full damages, when in truth his act was only in part, and it may have been in a very small part, the cause of the injury complained of; if it charges him with the consequences as of an act partially or wholly wrongful or criminal in its nature, but which he innocently performed; and if, in fine, the statute is justly subject to all the objections urged against it by counsel, still the answer must be, that the remedy is of a kind which must be sought in the legislative, and not in the judicial department of the government. They may constitute the best of reasons for legislative modification or repeal, but are none whatever for arresting the operation of the law by the judgment of this court.

The foregoing observations, we believe, meet all the constitutional objections which have been urged, and leave only one of that kind, concerning which more particular notice and comment seem to be required. It is assumed that the law legalizes or sanctions, in an unqualified sense, the act of sale by the party who has complied with the formal requirements prescribed, and obtained a license in the manner provided for by it; and then it is argued that the legislature has no power to inflict penalties or mulct the party in damages for the performance of a lawful act. The difficulty with this proposition is, as will be seen from the course of reasoning above adopted (if such reasoning be correct), that it assumes that to be an absolutely lawful act, which is so conditionally, or with qualifications only—expressly so made by the very terms of the law which authorizes the sale. It enters into and becomes a part of the license or authority to sell, that the individual accepting the same, bestowed *ex mero motu* by the legislature, takes it subject to the burdens thus lawfully imposed. The terms and conditions annexed by the law and qualifying the authority, inhere in and run with the license, and bind and restrain the licensee. He consents to them by accepting the license. The law is to be construed as a whole, and all its parts looked to with a view to their operation and effect on each other, conformably to the intention of the legislature. The form of enactment, being that by way of proviso, appended to the clause granting authority to sell, is such as to make the conditional nature of the license most clear and indisputable. The person or persons licensed are permitted to sell, but not otherwise than upon the conditions named in the proviso of the first section. He or they must enter into the bond therein prescribed, and submit to the obligations thereby imposed, and to the liabilities fixed and declared by the sixth section. For, as we read and understand the statute, and as we think the legislature evidently intended, the first and sixth sections are to be construed together. The bond provided for in the first section is to secure the liquidation and payment of the damages recovered under the sixth. The language of both sections sufficiently indicates this, so that the sixth section, which is more specific in its terms and accurate in the definition of the liabilities imposed, operates as a limitation upon the general words contained in the first, and restricts the

general obligation of the bond to the class of cases or kind of damages mentioned in the sixth.

The court has thus, at the urgent solicitation of counsel on both sides, considered and expressed its opinion upon the constitutional questions presented and argued upon the motion to quash the alternate writ of mandamus, and it has done so without first adverting to the question, preliminary in its nature, whether the case made by the petition is in any way a proper one for the application of the remedy, which question, had it first been considered, would have resulted in the decision of no other. No writ of mandamus can properly issue in such a case as this.

The licenses issued without the giving of the bond being void, of course no revocation of them by the mayor is necessary. It would be a merely idle act for him to do so, and a still more idle act for the law or this court to require it to be done. But whether the licenses were void or not, there existed ample remedy by suit or prosecution at law to test the questions and settle the controversy, which of itself is always sufficient cause for refusing the writ or for quashing it, if it has been improperly issued.

It is a circumstance not perhaps unworthy of observation here, that almost at the commencement of our existence as a state a law was enacted the very same in principle as that under consideration, although in some respects far more stringent and exacting in its provisions, and that it remained upon the statute books for the period of two years or thereabouts, without, so far as we know, its constitutionally being in any manner brought in question. It will be found in chapter 29, of the R. S. of 1849, the first systematic code of laws enacted by the state after its admission into the Union.

By the court—Motion to quash denied."

State, etc. *v.* Ludington and al. June, 1873. 33 Wis., 107.

MISSISSIPPI ASSERTS HER POLICE POWER.

SUPREME COURT OF MISSISSIPPI.

"SIMRALL, J., delivered the opinion of the court.

The only question seriously pressed is as to the validity of the "act" of 1874 to amend section 2459 of the code of 1871, regulating the sale of vinous and spirituous liquors, etc. The act to which this statute is an amendment is chap. 56, code 1871, none of which is affected by the legislation in question except section 2459. The first section of the chapter declares "it shall not be lawful for any person, except druggists and physicians under the restrictions hereinafter named, to sell vinous and spirituous liquors in a less quantity than one gallon without first having obtained a license therefor." The prohibition is to sell by the retail (less than a gallon); the privilege so to do, however, may be obtained on certain conditions.

The subject of retailing liquor has, from the earliest time, been subject to regulation. A compilation of the earlier statutes was made June 29, 1822. Hut. code, pp. 264, 265, 266. The second

section has the feature of requiring the applicant to be recommended by at least six respectable freeholders (in some cases, householders), and the third section exacts a bond. For cause, the license may be revoked. This was followed by the act of 1837, commonly called the gallon law, which repealed the former license laws and prohibited the sale altogether in less quantities than one gallon. In 1842 the legislature restored the license system, prohibiting all not licensed from selling in less quantities than a gallon, and requiring the applicant to be endorsed as a respectable person by five freeholders, and bond to be given. Hut. code, 270, 271. This statute was substantially incorporated into the revision of 1857, with additions and alterations. Among others, the applicant shall produce to the board of supervisors, or the town or city authorities, a petition signed by a majority of the voters resident in the police district or in the incorporated city or town which, with the counter petition, shall lay over one month, and if a majority of voters shall petition against such license, it shall not be granted for twelve months after such petition is so presented. Art. IV, pp. 197, 198. The license may be revoked if the party shall become an unfit person, or shall violate the provisions of the act. Art. VII, p. 198. Bond must be given that gaming, drunkenness or disorderly conduct will not be allowed, but an orderly, peaceable house will be kept. Chapter 56 of the present code is in substance the same.

This review of the legislation indicates that the policy of the state has been to prohibit, in general, the sale of intoxicating liquors by the glass, except that the special privilege was authorized to be granted to applicants who supported their claim by proper vouchers of being respectable persons, and who gave bond that they would not violate the statute, nor suffer disorder or drunkenness on the premises. The assumption in all this legislation has been that it would be unwise and detrimental to permit the promiscuous, unrestricted sale of vinous and spirituous liquors by the small or the drink, and that the privilege should only be granted to the discreet and reputable, and that, too, under the security of bonds and subject to revocation for good cause.

Art. 2459, like a corresponding section in the statute of 1857, demanded that the petitioner for license should support his claim with a recommendation signed by a majority of the legal voters of the police district, or of the incorporated city or town, that the applicant is of good reputation, and a sober and suitable person to receive a license. Opportunity is given of fully canvassing the matter by allowing counter petitions, etc. Except when the sale by the glass was totally prohibited by the act of 1839, the law from 1822, forward, has always insisted that the privilege should only be granted to a fit person, and the evidence of that under the older statutes should be furnished by six freeholders, or five freeholders, and under the later statutes by a majority of the legal voters of the locality, and under the last amendment of 1874, by a still larger number of persons residing in the district, town, or city, those more immediately affected by it. It would seem that it ought hardly to be questioned at this day that it belongs to the

police power of the state to regulate the retail dealing in and sale of intoxicating liquors. Perhaps all the states have legislated on the subject; some by total prohibition, and others by dealing with the subject under rules and regulations. Such legislation rests on the popular conviction that it is to the interest of morals, sobriety, industry and good order that the state should hold the traffic under surveillance.

The state may deal with the subject by absolute prohibition or by regulations. Bartemeyer *v.* Iowa, 18 Wall., 129; license cases, 5 How. (S. C.), 504; Cooley const. lim., 581-2-3. The police power extends to wholesome restrictions on property and individuals, in order to secure the general health, comfort and prosperity of the state. The power of the legislature cannot be questioned. Thorpe *v.* R. & B. R. R. Co., 27 Vt., 149; Commonwealth *v.* Alger, 7 Cush., 84. If the state may require the recommendation of five or six freeholders, it may enlarge the number to ten or fifty. In a word, it may, in its discretion, lay down the terms upon which the license may issue. During all the years that these several statutes have been in force, with the many indictments and litigation that have grown out of them, we have been referred to no case that throws doubt or suspicion on their validity. In House *v.* state, 41 Miss., 737, so far from casting suspicion on art. IV, p. 197-8 of the code of 1857, which is the original of section 2459 of the present code, it was expressly held that the grant of license "without the petition of a majority of the legal voters resident within the city is null and void. The court says (pp. 742, 743) that the instruction of the circuit court, which embodied that idea, announced a correct principle of law. It will be observed that the statute of 1857 applied more stringent terms to the applicant for license than the former laws, nor was it debated at the bar, or alluded to by the court that it was not as completely in the competency of the legislature to require the petitioner for license to be supported by a majority of voters, as by the few householders, or freeholders under the prior laws.

The statute of 1874 makes a further enlargement of the countenance and support which the applicant must have. He must produce a petition, signed by a majority of the male citizens over twenty-one years, and a majority of the female citizens over eighteen years of age, resident, etc. It would not be controverted if the legislature might require a majority of the legal voters. It could, in its discretion, have increased the number to two-thirds or three-fourths, or it might have returned to the old statutes and have insisted upon the consent of two-thirds, or a majority of the freeholders or householders. If that be true, upon what rule of constitutional law shall it not be allowed to demand, as in this statute, the consent of a majority of male citizens over twenty-one, and of females over eighteen years of age?

Whether the recommendation and consent of any person resident in the district or town or city shall be obtained or not, or whether the whole matter shall be referred to the judgment of the board of supervisors, or town or city authorities, is purely a matter for the wisdom of the legislature.

However the question may be elaborated, it comes to this complexion at last: Has the legislature the power to regulate the sale of vinous and spirituous liquors? The answer is, that it has done so from the beginning until now, and no decision has been referred to which so much as doubts the power. These rules and regulations have been variously changed from time to time, at the pleasure of the representative body. Can the judiciary interfere and pronounce judgment on the expediency and fitness of rules which are exclusively committed to the legislative choice and discretion? A court must be pointed to some provision of the constitution which a statute violates, before it can declare it inoperative. "As to the policy of legislation, the judiciary have nothing to do; that is wisely left to the law-making department. A court only consults the policy of a law, as an aid to attain the legislative meaning and intent." If a law is touching a subject not given up to the national government, nor prohibited by the federal constitution, nor excepted out of the legislative power in the state constitution, can the judiciary listen to argument founded upon its supposed inutility and inexpediency? It involves the inadmissible proposition of the judiciary sitting in review upon legislative wisdom and discretion. Donnell *v.* state, 48 Miss., 679. The premise is that the legislative control over the subject is plenary. If terms are imposed which are harsh and unwisely chosen, the courts cannot interfere to cure or correct legislative indiscretion, nor has it the right or power to suggest other regulations deemed more suitable. The people *v.* Simeon Draper, 15 N. Y., 545. "If a particular act of legislation does not conflict with any of the limitations or restrictions of the constitution, it is not in the power of the courts to arrest its execution, however unwise its provisions may be, or whatever the motives that led to its enactment. The remedy for bad legislation is better afforded by frequent removals of the legislative body than any that can be given by the courts."

"The representative body is entrusted with the responsibility of consulting the public interest and carrying out public policy by the enactment of laws. The power to review their fitness and wisdom does not belong to the courts. In 1857, the legislasure said a majority of the voters must petition for the license. In 1874, it has said more than that. The question before the court is not as to the fitness and expediency of the law, but whether the legislature was competent to pass it. The argument made against the validity of the statute of 1874 is, that it submits the question of license or no license to a vote, which, it is urged, involves an abnegation of legislative power, and a devolution of it upon electors, which cannot be done; and, more than that, it authorizes females, some of whom are minors, to have a voice in the election. Is the law fairly obnoxious to that criticism? It is much freer of that objection than the statute of 1857, under which House's case was decided. "All male citizens over twenty-one" is a larger denomination than "voters." It embraces all voters, and many more besides. The inclusion of females over eighteen shows conclusively that the petition for license was not meant to be limited

to "voters," and that the idea of an "election" by the class entitled to "vote" was not in the mind of the legislature. The principle upon which the law rests is, that the license shall not issue unless a majority of the community, who have reached that maturity of mind that qualifies them to judge of the quality of the act and its effects, shall petition for it. Females who participate have attained a marriageable age, and are profoundly concerned that those with whom their future may be linked should be surrounded with influences that contribute to sobriety, thrift and prosperity. That may have been one of the motives of associating them with the males over twenty-one in the right to petition for or against the license. We are not called upon to say that the conditions are unreasonable. This statute is not framed upon the theory of what are called optional laws. It does not propose to submit the "question" to a vote, whether license shall or shall not be granted in the county, or incorporated city or town. The power in the board of supervisors, or the mayor and aldermen, is not made dependent upon a vote in favor of its exercise. The statute grants to these municipal bodies authority to issue license to those applicants who present a petition or recommendation signed by the number of persons named. The application of one person may be thus sustained, whilst another may not be. Just as under the earlier statutes, one person might procure the recommendation of the freeholders and householders, and another might not. As, under the act of 1857, one person might be recommended by the majority of the voters, whilst others might altogether fail. So, too, under any one of these statutes, there might be the requisite recommendation signed; but the party might fail of his license from inability to give the bond.

The parallel of the statutes of 1857, of 1871, and the amendment of 1874, is found in the act of 1833, in reference to the leasing of the sixteenth section (the school lands) leases for ninety-nine years which should be granted by the township trustees, on a request of "a majority of the resident heads of families" (minors not excepted). Here the act could be done on "consent obtained" of heads of families, including minors. Some of these heads of families might be females, aliens.

Under the statute of 1822, and the early amendments, the freeholders or householders who vouched for the petitioner for license might be females, adults or minors. The statutory qualification was "freeholders" or "householders."

Legislation on this subject has been tested in various forms. Perhaps experience has shown that the police power of the state, whether put forth in the form of prohibitory laws, or in subjecting the retail traffic to regulations and restrictions, has not been able to suppress intemperance.

The general policy has been to entrust the sale of intoxicating liquors by the drink to those only who could procure evidence of good reputation, and then to put them under bonds, and surround them with such checks as would best provide against excesses and abuses.

A wisely regulated license system is perhaps the best that the state can do.

Whether the existing law is of that character is not our province to say. The rest may be left to those religious and moral influences which continually advance and improve our civilization.

There is no error in the judgment; let it be affirmed."

Rohrbacher *v.* Jackson. Oct., 1875. 51 Miss., 741.

KANSAS ASSERTS HER POLICE POWER.

SUPREME COURT OF KANSAS.

"This power is sustained as a part of the police power of the state, a power whose limits are perhaps as illy defined as any power claimed or exercised by the state. "It is much easier," says Ch. J. Shaw, in Commonwealth *v.* Alger, 7 Cush., 84, "to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise." It aims to regulate the intercourse of citizen with citizen, to prescribe the manner of using one's property, and pursuing one's occupation, so as not to trespass on the property or rights of others; and as such, is a power whose necessity and uses grow with the increasing complexities of our civilization, and the increasing diversities in the industries and modes of life. The sphere therefore of its operations is ever widening."

K. P. R. Co. *v.* Riley. July, 1876. 16 Kan., 575.

"BREWER, J. Defendant was convicted in the district court of Greenwood county on a charge of selling liquor without a license, and from such judgment of conviction he appeals to this court. The prosecution was commenced by the city of Eureka, in the police court of that city, and was for a violation of the city ordinance. On the trial, the fact of the sale was conceded, and the defense was that defendant had a license. The validity of this license, and the right of the plaintiff to question its validity, are the questions in the case. That a petition signed by a number of citizens was presented to the city council, approved by the council, and license ordered to be issued; that a license was issued, bond given, and payment for the license made to the city treasurer, and the money retained by him up to the time of the trial, were all proved. The city then offered in evidence the list of adults required to be made and filed by ch. 86, laws 1868, which list contained the names of 341 persons. The petition contained only 156 names.

Upon this, counsel for appellant contends that the city council is the tribunal to pass upon the sufficiency of the petition, and that having adjudged it sufficient, that matter is no longer open to inquiry; and secondly, that the city having received and retained the license money, is estopped from questioning the validity of the license or prosecuting the defendant for doing what it had given him a license to do; and thirdly, that section 2 of said chapter 86, which prescribes that the list of adults provided for in

section 1 is conclusive as to the number thereof in certain cases, is unconstitutional, because the subject-matter thereof is not expressed in the title to the act.

We cannot concur with counsel in any of these matters, and are of the opinion that the ruling of the district court was correct, and that the judgment must be affirmed. In reference to the last question, the title to the act is, "an act providing for registration of all adult persons in each county in this state." Section 1 declares who shall make the registration, and when, where the same shall be filed, and what it shall contain. Section 2 reads, "that whenever it is necessary to ascertain the number of adult persons * * * upon which to have any action of the county commissioners or other county officers, the list on file in the county clerk's office shall be taken as conclusive on that subject." In other words, § 2 prescribes the use to be made and the effect to be given to the list. Is this outside the scope of the title, and foreign to it? We think not. It must be borne in mind that while the constitutional provision is mandatory, it must be applied in a fair and reasonable way; otherwise, it would become the source of more injury than the ills it was designed to remedy. We are not to expect in the title a synopsis or abstract of the entire act. It is enough if the title indicates clearly, though in general terms, the scope of the law. As is said by Judge Cooley in his constitutional law, page 144:

"The general purpose of these provisions is accomplished when a law has but one general object, which is fairly indicated by its title. To require every end and means necessary or convenient for the accomplishment of this general object, to be provided for by a separate act relating to that alone, would not only be unreasonable, but would actually render legislation impossible."

Now here is an act which by its title, we are informed, is concerning registration of adults. What more natural than a statement in such a law of the effect of registration when made? As in a statute "regulating conveyances of real estate," we find a statement of the place where such conveyances are to be recorded, and the effect of such record.

Passing now to the other questions (and we shall consider them together), we remark that it is undoubtedly true that the council is the tribunal to which the petition must be presented and by which its sufficiency must in the first instance be determined; but such determination is not, at least as to the matter in question in this case, conclusive. Here is not a matter of judicial discretion, but a matter of mathematical calculation. The law has made a certain list conclusive as to the number of adult persons. It has not left this matter open to inquiry by the council; and it has also declared that a majority of the adult persons shall sign the petition. Now when a petition is presented whose number of names is not half of the number on the list, no determination or finding of the council can make that a majority. That which a council may not do directly, it may not do indirectly. It may not by ordinance dispense with a petition of the majority; it may not accomplish the same result by finding that 156 is a majority

of 341. And there is no *bona fide* purchaser of bonds before maturity in this case. The question arises between the original parties. No equities have intervened; nothing has transpired since the issue of the license to make it more binding as a contract, or to estop the city from denying its validity. The city council is not the city, any more than the treasurer is the city. They are but officers, and in this respect the functions of the council are of no higher order than those of the treasurer. And as said by chief justice Kingman, in Hartford fire insurance company *v.* the state, "the limits of an officer's authority are found in the law." The council had authority to grant a license after a petition, signed by a majority of the adult residents, had been presented. It had no authority in the absence of such a petition. None such was presented, not even one *prima facie* sufficient. But, say counsel, very earnestly, the city has received pay for this license and has issued it, and now can it punish the defendant for doing what it has licensed him to do? The fallacy of this is in confounding the officer with the corporation, the agent with the principal. The ordinance specified the exact amount which each licensed liquor seller should pay. Now, would it for a moment be contended that because the defendant had paid to the city treasurer the amount of such license fee, and said treasurer still retained it, the defendant had the right to sell liquor and defy prosecution? Clearly not; and why? Because, though an agent of the city had received this money, it was an unauthorized act, and he could not by it bind his principal, nor evade or nullify the law. Suppose, further, the mayor and clerk had issued a license, they being the officers to execute the license, and the treasurer had received the money, would not the same result follow, and for the same reason? Does it make the defendant's case any stronger that the council had, without any authority and in defiance of the law, directed the mayor and clerk to issue such license? This is not a case where discretion having been vested in an officer, he has exercised that discretion, and the city seeks to repudiate his act. It is a case where the officers of a city have assumed to disregard the law; and a party at whose instance they acted, and who being chargeable with knowledge of the law, must be presumed to have known that they acted without authority, invokes their acts to protect him from the consequences of his own violation of the law. Nor is there any room for the application of the doctrine of estoppel. There is no estoppel when both parties act with full knowledge of the facts and the law. The dramshop act and the ordinance each requires, as a condition precedent to the action of the council, a petition of a majority of the adult residents. Every one is presumed to know the law; and, in fact, probably no law in the statute book is better known than the dramshop act. The list of adults is a public document, on file in the county clerk's office, and open to the inspection of every one. That list is by statute conclusive as to the number of adults. May any officer or combination of officers disregard these provisions of statute to-day at the instance of a citizen, and to-morrow that citizen plead such disregard as a protection to his own unlawful acts? The case of

Hartford fire insurance company *v.* the state, 9 Kas., 210, is in point, and conclusive. Counsel lays stress on the fact that this is a prosecution by the city for a violation of the ordinance, and not by the state for a violation of the dramshop act; but in the case just cited, the state officers had issued the license, and the state treasurer had possession of the money, and the state prosecuted for the penalty. Again, we repeat that "the limits of an officer's authority are found in the law," and they who deal with officers are chargeable with notice of the limits of such authority, and can receive no protection from acts done by such officers beyond the limits of their authority.

The judgment will be affirmed.

All the justices concurring."

Eureka *v.* Davis. January, 1879. 21 Kan., 579.

NEBRASKA ASSERTS HER POLICE POWER.

SUPREME COURT OF NEBRASKA.

"To our minds it is clear that the restriction relied on has no proper application to this case, and that the authority given by the act regulating the sale of spirituous liquors, is but a proper exercise of the police power of the state, of which, by the constitution, the legislature is made the sole custodian and dispenser, and not an exercise of the power of taxation. That regulation of a traffic, believed by the legislature to be pernicious in its effects upon society, and not the raising of revenue merely, is the chief design of the act, it would seem no man of intelligence can doubt, who reads it. It will be seen that a license cannot go out, as a matter of course, to whoever may apply, on payment of the required fee, but only when "deemed expedient" by the officers having the matter in charge, and on "the application by petition of thirty resident freeholders of * * * the precinct where the sale of such liquor is proposed to take place, setting forth that the applicant is a man of respectable character and standing, and a resident of this state, and praying that a license may be issued to him." Sec. 1 of the act, chap. 50, comp. statutes, 333.

Section two provides that before any action shall be taken on such application at least two weeks notice must be given, "when, if there be no objection in writing made and filed * * * and all other provisions" (of the law) "have been fully complied with, it may be granted." If, however, there be any objection or protest filed, a hearing for the determination of the matter is provided for by the next two sections, and if it be proved that the applicant has violated any provision of the act within the space of one year, or that any former license to him has been revoked for any misdemeanor against the laws of this state, then the license shall be refused. Section six provides that before the license shall be granted the applicant must give a bond to the state with sureties in the penal sum of five thousand dollars, "conditioned that he will not violate any of the provisions of this act, and that he will pay all damages, fines, and penalties, and forfeitures which may be adjudged against him under provisions of this act."

Among the more prominent matters of regulation we find that by section eight, "every person licensed as herein provided, who shall give or sell * * any intoxicating drinks to any minor, apprentice, or servant, under twenty-one years of age, shall forfeit and pay for each offense the sum of twenty-five dollars." By section ten, the sale to indians, insane persons, idiots, and habitual drunkards, is prohibited under a penalty of fifty dollars. Section eleven provides that "all persons who shall sell or give away upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks, without having first complied with the provisions of this act, and obtained a license as herein set forth, shall for each offense be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than one hundred dollars, and not more than five hundred dollars, or to be imprisoned not to exceed one month in the county jail, and shall be liable in all respects to the public and to individuals, the same as he would have been had he given bond and obtained license as herein provided." Section thirteen prohibits the sale of adulterated liquors, and provides a penalty of one hundred dollars for each offense. Section fourteen prohibits the sale or giving away of such liquors on election days and Sundays, under a penalty of one hundred dollars for each offense. Section fifteen provides that "the person so licensed shall pay all damages that the community or individuals may sustain in consequence of such traffic; he shall support all paupers, widows, and orphans, and the expenses of all civil and criminal prosecutions growing out of, or justly attributed to his traffic in intoxicating drinks." Section seventeen gives a right of action to counties and cities for the support of persons pauperized by intoxication, against those causing it by the sale or gift of liquor. Section twenty-nine makes it the duty of venders "of malt, spirituous, or vinous liquors, under the provisions of this act, to keep the windows and doors of their respective places of business unobstructed by screens, blinds, paint, or other articles," and the failure to do so is made a misdemeanor, subjecting the offender to a fine of not less than twenty-five dollars, or imprisonment in the county jail not less than ten days, or both, at the discretion of the court, and the forfeiture of his license.

There are other matters of regulation in this act, but these will answer our present purpose, which is to show that, although a large license fee is required, the conclusion is irresistible, that the leading motive of the legislature in enacting the law could not have been the raising of revenue, but rather to thoroughly regulate, and as far as practicable suppress a traffic, the tendency of which was believed to be productive of pauperism, vice, misery, and crime, to the great injury of the people of the state at large, and especially of the particular locality where it is carried on. If revenue merely from such traffic, and not regulation, had been the object of this law, it is not at all probable that those desiring to engage in it would have been met by the many discouraging embarrassments which are here thrown in their way.

It is further claimed that the constitution is violated by sec. of the act, in providing for an appeal to the district court from

the decision of the county board. As we understand this provision, an appeal is allowed only from a decision of the board upon the question of whether the applicant for a license has been guilty of a violation of any of the provisions of the act within one year; or whether any former license issued to him has been revoked for a misdemeanor against the laws of this state, and not from their decision as to the advisability of licensing the traffic at all. *The determination of this latter question seems to be left by the first section to the sole discretion of the board of commissioners in counties, and to the municipal authorities in cities and villages.*

Another objection urged to this law is that sec. 18 is a violation of sec. 6, art. 1 of the constitution, which guarantees the right of trial by jury. We fail to see any merit in this point. The section complained of simply provides what effect may be given to certain evidence in fixing responsibility for injurious results of intoxication. We think it is competent for the legislature to do this, upon the same principle that statutory effect is given to various kinds of evidence, such as historical works, books of science or art, entries, and other writings of persons deceased, books of account, notarial protests, etc. It is certainly not an unusual exercise of power by the legislature, and as to it we know of no constitutional restriction. The effect of this provision is nothing more than an assertion of what shall be sufficient, if proved to the satisfaction of the court, to make out a *prima facie* case. No decision is cited by counsel, and we know of none which sustains them in the position taken.

Still another ground of alleged unconstitutionality in this law is, that sec. 28 confers upon justices of the peace the pardoning power, whereas by sec. 13, art. v of the constitution, it can be rightfully exercised only by the governor of the state. The section in question makes intoxication a misdemeanor, and affixes as punishment therefor a fine of ten dollars and costs of prosecution, or imprisonment in the county jail not exceeding thirty days. *And it provides that the magistrate before whom a conviction is had may remit any portion of such penalty and "order the prisoner to be discharged upon his giving information, under oath, stating when, where, and of whom he received the liquor which produced the intoxication, and the name and character of the liquor obtained."*

In the first place we do not think that the authority here conferred can properly be classed as a pardoning power. It is not of the character of that given by the constitution to the chief magistrate of the state. It is a provision of the law excusing an act which it makes a misdemeanor, upon clearly specified conditions. Without these conditions are strictly complied with, the magistrate has no power to relieve the accused from any part of the penalty. One requirement is substituted for another. Not so, however, in the case of pardon under the provision of the constitution. In that, full power is given to the governor, and he may exercise it in his discretion, and for such reasons as to him may seem sufficient. To be pardoned, in the proper sense of the term, is not a right given for a consideration to the individual by the legislature, but a free gift from the supreme authority, confided to the chief

magistrate, and to be bestowed according to his own discretion.

The only remaining ground of constitutional objection to the law is, that it arbitrarily prohibits the sale of liquors within a strip of two miles around an incorporated city or village, while it may be licensed both within and without that limit. This provision violates no command of the constitution. It is general in its application to all territory of the state falling within such description, and it but an exercise of the police power intrusted to the legislature. It is referable to that principle which enables the legislature to prohibit liquor selling on Sundays and on days of elections, or within the vicinity of fairs, camp-meetings, and other gatherings of the people. It is the power exerted by the legislature of Kentucky, and recognized in board of trustees of Falmouth *v.* Watson, *ante, in the provision that persons engaged in the retail of spirituous liquors within one mile of an incorporated town must have a license to do so from the proper officers thereof, although already licensed by the county authorities under another general law of the state.*

The only remaining objection to the judgment to be noticed is, the alleged error of the court in ruling from the jury the license issued to the prisoner under a prior statute, since repealed. It is conceded by counsel, and so the law is, that it is competent for the legislature to revoke a privilege given by a license. The citation of authorities is unnecessary on this point. But it is contended, very strenuously, that the rejected license had not been annulled, and that therefore it ought to have been admitted as a complete defense to the charge against the accused.

But was it the intention of the legislature, by the repeal of the old law and the enactment of a new one, to revoke unexpired licenses? The answer to this question must be found in the new law, by which the repeal was effected, and under which this prosecution originated. Looking to it, we find, first, that the repeal was absolute, and without saving terms, which, in all probability, would not have been entirely omitted had it been intended to preserve existing license privileges. While it may be conceded, as claimed by counsel, that this omission of an affirmative saving provision will not of itself warrant us in holding that the legislature, by the mere repeal of the former law, intended the revocation of such privileges, we do find in the body of the new law satisfactory evidence of such intention. It is provided by sec. 11 that "all persons who shall sell or give away, upon any pretext, malt, spirituous, or vinous liquors, or any intoxicating drinks, *without having first complied with the provisions of this act, and obtained a license as herein set forth*, shall, for each offense, be deemed guilty of a misdemeanor," etc.

This act, as we have seen, went into operation on the first day of June, 1881, and by the above provision the entire traffic is, by the most expressive language, absolutely prohibited, except by persons "having first complied with the provisions of"—not some other law; but of—"*this act.*" Now suppose, for instance, that the traffic had been prohibited as above, without any provision for its legalization by the procurement of a license, would any

one contend that effect could be given to an authority granted under a prior statute? Very clearly not. So we say that, the prohibition being absolute, except upon certain specified conditions, those conditions must be observed or the traffic is illegal. We see no escape from this conclusion.

We have now carefully considered all of the objections urged to the enforcement of this law, and find them to be untenable. Were we acting in the capacity of law-makers, if our business were to determine what the law should be instead of what it is, possibly as to the point last noticed, and perhaps some others, we might believe it best to withhold our assent until some important modifications were made. We might insist that privileges granted through former licenses should be protected, or at least not entirely disregarded by the new law; and also that a material distinction be made in the amounts required from persons selling all kinds of intoxicating liquors, and those selling ale or beer alone. But these are matters purely of governmental policy, intrusted by the constitution exclusively to the legislative department of the government, and with which the judiciary have not the slightest concern, so long as no right secured by the paramount law is invaded, except, when appealed to, to uphold and enforce the properly expressed will of the law-making power. This is a constitutional and valid law. Judgment affirmed."

Pleuler *v.* state. July, 1881. 11 Neb., 547.

FLORIDA ASSERTS HER POLICE POWER.

SUPREME COURT OF FLORIDA.

"The chief justice delivered the opinion of the court:

Arpen applied to the collector of revenue for a license to sell intoxicating liquors, tendering the amount required by law. The collector refused to issue the license, upon the ground that the "act to regulate the sale of liquors, wines and beer in the state of Florida by the boards of county commissioners of the several counties" had not been complied with. This act was approved March 3, 1883, and is designated as chapter 3416. Arpen then obtained an alternative writ of mandamus from this court, directing respondent to issue the license or show cause, etc. On the return of the writ, respondent moves to quash upon the ground that the act of March 3, chapter 3416, had not been complied with. Sections one and two of this act require of the person wishing to sell such liquors in any election district that he shall make application to the board of county commissioners, at a regular meeting, for a license, which application must be signed by a majority of the registered voters of the election district, as shown by the registration list, asking the board to grant to him the right to sell liquors. The applicant is required to make oath that every signature to the application is genuine, and that there was no fraud, bribery or deception in procuring the signatures. Each signature must be attested by two credible witnesses, and the petition must be published in a newspaper in the county, or if

there be no such paper, it must be posted at the county site and in the election district for two weeks before the meeting of the commissioners.

The third section forbids the collector to issue the license unless a permit is presented from the county commissioners, and provides that the license shall contain a provision that the same may be suspended or revoked by the board of commissioners for cause, to wit: selling liquors, wine or beer to a minor or person intoxicated.

The fifth and sixth sections provide that on complaint that the licensee has violated this provision, the license may be suspended and revoked, when notice having been given of any complaint, it shall appear, by the proofs to be taken before the board, that there has been such violation, the board hearing and determining the same.

It is claimed by the relator that the act is inoperative, because it is "not complete in itself;" that it contains no provision for issuing a license, or on what terms it shall be issued.

The legislature, at the session of 1881, by chapter 3219, had enacted that state licenses should be issued to dealers in spirituous liquors by the collector of revenue on the payment of three hundred dollars for each place of business, and that counties and incorporated towns and cities might exact a further amount, not exceeding fifty per cent. of the state tax, the license to be signed by the collector and clerk of the circuit court.

By an act approved March 5, 1883, chapter 3413, the act of 1881 was repealed, but the provisions above referred to were re-enacted to all practical intent, it being an act revising the revenue law of the state.

There is no incongruity in the acts of March 3 (prescribing the conditions and mode of applying for the license) and the act of March 5th, which fixes the amount to be paid on issuing the license. The two acts relating to the same subject matter are in entire harmony as to their practical operation.

But it is contended that because the act approved March 5th is operative in itself and does not require a petition or the action of the county commissioners to authorize the issuing of a license, its operation and effect is to repeal the act of March 3d. There is nothing in the act of March 5th expressly repealing anything except the act of 1881, but it is urged that the act of March 3d is repealed by necessary implication by that of March 5th, that being a later act it supersedes the former.

The answer to this is that there is no incongruity between them; that the act of March 3d had not been approved and was not a law when the last act was passed; and the legislature adjourned on the 2d day of March, leaving both acts in the hands of the governor for his approval, thus indicating that the legislature intended that both should become laws. It can scarcely be contended that the governor intended that one should repeal or defeat the other by signing the one on Saturday and the other on Monday, even if it lay in his power thus to destroy the effect of the former. He signed both in furtherance of the legislative will,

and doubtless if the revenue law had first come to his attention he would have signed it first. There is nothing here to indicate that the act last approved was intended to repeal the first, and the acts being in *pari materia* must be upheld if both can be made effective. Fla. A. & G. R. R. Co. *v.* P. & G. R. R. Co., 10 Fla., 145, 160; Mitchell *v.* Duncan, 6 Fla., 13, and authorities cited; House *v.* state, 41 Miss., 737.

It is urged that the fifth and sixth sections are unconstitutional in that they create a judicial tribunal unknown to the law, by investing the county commissioners with judicial power to hear, try and determine a complaint against a licensed dealer and to impose a penalty, i. e., to revoke the license; and it is claimed that these sections are so interwoven with the act of March 3d that the whole act is tainted with illegality.

While we agree that the provision of the sixth section does attempt to confer judicial power upon the board in the respect stated, and that so much of the fifth and sixth sections as is liable to this objection is void under the constitutional provision which forbids the creation of courts not mentioned in the constitution, yet if those sections were entirely eliminated the act would not be in the least affected in respect to its general purpose as expressed in its title. The act yet remains entirely operative to provide the method of making application to the board and obtaining its permit to the issuance of the license which is the purpose of the act. The objectionable sections relate to a proceeding to annul it, a feature by no means essential to the operation of the act in other respects. An act may be void in part without affecting other portions of it, if that which remains is capable of being executed in accordance with the purpose of the legislature wholly independent of that which is rejected. Cooley's con. lim., 177, 180.

It is further claimed that the practical working of the law would be pernicious, promotive of criminal and demoralizing practices, and is therefore void as against public policy. It is argued that "its tendency is to wrest the liquor business from the hands of the better element of dealers and place it in the control of the more corrupt and venal. For it may be that an honest, respectable, fair minded dealer may not be able to procure the endorsement of the majority of the registered voters, except by practices to which he would not resort. Not so, however, with the evil minded and wickedly disposed citizen. He would not hesitate to go out into the byways to give an ignorant and corrupt voter a drink or a dollar for his endorsement, and thus purchase the requisite majority, and afterwards add perjury to his other crime by taking the oath required by the act." The act is thus said to be bad in morals and against public policy.

This is a harsh arraignment of the legislative branch of the government, which would pass an act tending to sacrifice the moral life of the community. If the argument were addressed to the legislature it might be induced to prevent the threatened mischief by requiring that there should be an entire prohibition, or an unanimous *call* to the business, instead of the consent of a

purchased majority. But this is not an argument to be addressed to the courts.

The legislature alone must deal with measures of mere public policy in respect to these as well as other affairs of public propriety and welfare.

The practical result of sweeping away this restrictive act would be, that any bad man in the community might go to the collector and pay the license tax and *demand* a license and invoke the whole power of the state to compel the collector to issue it to him, though no sane man in the county would sign his application; for the law of 1881, re-enacted by that of March 5th, 1883, reads: "Which license shall be issued to each person on receipt of the amount hereinafter provided." It was doubtless with the view to prevent the sale of intoxicating liquors by persons who ought not to be entrusted with the agency, that the act approved March 3d was passed.

Another objection to this act is that it contravenes that provison of the constitution which requires that all laws of a general nature shall have uniform operation throughout the state. [Sec. 17, art. 4, of the state constitution, enumerates certain cases in which *no* local or special law shall be passed. The other provisions of the state constitution are set out on pp. 574-5 of this volume.—REP.] It was conceded in the argument that the act is not what is termed a "local option" law, i. e., a law to take or not to take effect in a given locality upon the consent or dissent of the voters of the locality, or upon other contingency while it may have effect in other localities. There is nothing in the act providing that it is to take effect or not, either generally or locally, upon any contingency. There is nothing in it indicating that licenses shall or shall not be granted upon the assent or dissent of the majority of voters anywhere. It simply provides that a license shall not be granted to the particular individual, unless upon these several conditions: 1, that his application must be freely signed by a certain number of voters requesting that this person be granted a license to sell liquors in a designated place; and 2, that he pay for the privilege a certain sum of money. The act is uniform in its operation throughout the state, and uniform in its operation upon every person who wishes to engage in the occupation of a liquor dealer. No person is prohibited by it from obtaining the requisite number of petitioners or paying his money or receiving a license, nor is there any locality in the state where he is forbidden to sell liquors upon complying with the law. This law is uniform, because it operates alike upon all persons in all parts of the state, who may desire to engage in the particular occupation. McConihe *v.* McMurray, 17 Fla., 238, 266, and authorities cited.

Laws imposing conditions and restraints upon the sale of intoxicating liquors as police regulations have been upheld everywhere. The sale of drugs, gunpowder, liquors, poisons of every kind, is uniformly regulated by placing conditions and restrictions upon it for the protection of health and morals. Men are not allowed to practice law or physic or surgery or sell drugs, unless they possess certain qualifications of learning, scientific knowledge, skill,

integrity, etc., and in addition may be required to pay a tax or license fee to the government for the privilege of carrying on their special business, in which they are protected by law, and these conditions are sustained by the courts as reasonable and proper for the protection of the public against the mischiefs that may flow from ignorance and quackery, and yet it can scarcely be contended that the laws regulating these matters are not uniform in their operation within the meaning of the constitution, simply because an ignorant or vicious man may not be able to comply with the conditions essential to the public welfare. *The right to impose conditions upon which men may be allowed to engage in a business which is the proper subject of police regulation, as before remarked, have been sustained by the courts everywhere, and as to the extent of the conditions, so long as they do not contravene the constitutional rights of persons, the legislature alone must limit them.*

In the case of the state *ex rel.* Henshall *v.* Ludington, 33 Wis., 107, where an act of the legislature declared it to be unlawful to sell intoxicating liquors without having first obtained a license therefor, and that no person shall be granted a license without giving a bond, "conditioned for the payment of damages to any person which may be inflicted upon or suffered by them, either in person or property or means of support, by reason of so obtaining a license, selling or giving away intoxicationg drinks, or dealing therein," and authorizing suits to be brought upon the bond by any person injured by the selling or giving away of intoxicating liquors, Dixon, c. j., delivering the opinion of the court, says: "Counsel for the respondent frankly concedes the constitutional power of the legislature to entirely prohibit the selling or giving away of ardent or intoxicating liquors or spirits to be used as a beverage, and attack only certain provisions of the act as being inconsistent with the authority to sell conferred, and repugnant to the constitutional rights of the citizen engaged in an authorized and lawful traffic or business. The point thus yielded, and as to which there would seem to be little room for controversy at the present day, of the general power of the legislature over the subject acted upon, * * * takes away all ground of constitutional support for the objection specially urged against particular clauses or portions of the act." The power to prohibit involves "the utmost limit of legislative discretion in prescribing the conditions of sale. * * * It may couple the license with conditions so oppressive, burdensome and unjust that no citizen can afford to apply for or accept the privilege and engage in the business." The court further says: "The subject with which we are dealing is not one of those pertaining to the primary and fundamental rights of the citizen, and as to which no unlimited control has been vested in the legislature." Counsel "seem to overlook this principal ground of distinction, and argue as if the action of the legislature was an infringement of the natural and inalienable rights of the citizen, declared and guaranteed by the constitution. * * * Unlike other trades and employments which it is the right of the citizen to pursue, undisturbed by arbitrary legislative interference and control, the person who engages in this must, within the limitation above indicated,

do so subject to such disadvantages and restraints as may be prescribed by the law making power which authorizes it." The constitution of Wisconsin contains no provision relating to the subject of intoxicating liquors or prohibiting the sale thereof. The doctrine of the court is the enunciation of the general fundamental rights of the legislature to prohibit or restrain by licenses, taxes, etc., and to impose such conditions and safeguards against the abuse of the traffic in an article of the character in question. It is not necessary for us to decide, and we do not decide here, that the traffic in intoxicating liquors may be wholly prohibited, but in the exercise of the police power of the state the legislature may regulate and restrain it, and this power implies that such conditions may be annexed to the application for a license as the legislature may deem reasonable; and if the conditions here annexed are such as may prevent the granting of licenses to immoral or dishonest persons, we have no right to say that the legislature may not prescribe the qualifications of those who may engage in the occupation of dealers in intoxicating liquors for the protection of the public against the conduct of vicious men who might otherwise engage in the business without restraint, owing nothing to the wholesome public sentiment.

"Those statutes (says Judge Cooley, const. lim., 581), which regulate or altogether prohibit the sale of intoxicating drinks as a beverage have also been, by some persons, supposed to conflict with the federal constitution. Such of these, however, as assume to regulate only and to prohibit sales by other persons than those who should be licensed by the public authorities, have not suggested any serious question of constitutional power. * * * The same laws have also been sustained when the question of conflict with state constitutions or with general fundamental principles have been raised. They are looked upon as police regulations, established by the legislature for the prevention of intemperance, pauperism and crime, and for the abatement of nuisances." Id., p. 583, citing decisions from Massachusetts, Iowa, Connecticut, Michigan, Illinois, Vermont, Indiana, New York and other states.

In the following cases laws referring to the people of towns and other localities the question whether licenses should be therein granted to sell intoxicating liquors have been sustained: com. *v.* Deans, 110 Mass., 357; com. *v.* Bennett, 108 id, 27; com. *v.* Turner, 1 Cush., 493; state *v.* Wilcox, 42 Conn., 364; state *v.* court com. pleas, 36 N. J. law, 72; Locke's appeal, 72 Pa. st., 491; Anderson *v.* com., 13 Bush. Ky., 485.

In the case of Anderson *v.* commonwealth, the court unanimously hold "that the sale by retail of intoxicating liquors may be constitutionally regulated; and that in localities, where in the opinion of the legislature or of its constitutionally organized agencies, the peace and good order of society so require, license to carry on the retail traffic may be refused altogether. * * * And further, that the legislature may create other agencies to determine the local question, and that it is no constitutional objection to the agencies created by the act under consideration

that they are composed of the body of the qualified voters of the city, town or civil district in which the necessary steps may be taken to test the sense of such voters on the subject of such retail traffic."

This decision expresses the views of many courts which have had the question before it, and the same rule would sustain the act under consideration. The supreme court of Indiana, in Groesch *v.* the state, 41 Ind., 547, holds that the constitution does not require that the operation of laws throughout the state shall be uniform in any other sense than that their operation shall be the same in all parts of the state, under the same circumstances and conditions. The act under consideration in that case required any person desiring a permit to sell intoxicating liquors as a beverage to file in the auditor's office a petition praying such permit, stating among other things that he is a proper person to receive such permit, which petition shall be signed by the applicant and also by a majority of the legal voters resident in the ward or township where the applicant proposes to sell such liquors. The board of commissioners on being satisfied that the petition is in proper form, and that it has been signed as required, shall direct a permit to be issued by the auditor upon his complying with the provisions of the act, paying for the permit and giving bond as required by law. Says the court: "Thus the qualifications and fitness of each person, as well as the wish of the petitioners for the establishment of the business in their neighborhood, are at once settled by the voice of those who are most intimately concerned. If they do not thus open the door to the traffic the law provides that, so far as the applicant is concerned, it shall remain closed." The compliance with such conditions, the court says, has not been considered as involving the exercise of legislative functions, and the act is general in its application to every locality, and uniform in its operation. The people, in their sovereign capacity, do not enact or give vitality to the law or nullify it, but aid in its enforcement.

A law similar to this was also adjudicated upon in House *v.* the state of Mississippi, 41 Miss., 737, where it was decided that the power to grant such licenses must be exercised in accordance with the requirements of the act, "and a grant of license without a petition of a majority of the legal voters resident within the city is null and void." To the same effect see Rohrbacher *v.* mayor, etc., 51 Miss., 735, 743.

It is further urged with great tenacity on the part of the relator that the act under consideration is in violation of the fourteenth amendment to the constitution of the United States, which runs thus: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, *are citizens of the United States* and of the state where they reside."

"*No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person* of life, liberty or *property without due process of law*, nor deny to any person within its jurisdiction the equal protection of the laws."

A case came before the supreme court of the United States, reported in 18 Wallace, 129 (Bartemeyer *v.* Iowa), in which was involved the right of the state to regulate the traffic in intoxicating liquors, and it was urged that such a law was void as violating the privileges or immunities of citizens of a state or of the United States. The court says: "We think that the right to sell intoxicating liquors, so far as such a right exists, is not one of the rights growing out of citizenship of the United States." Mr. Justice Bradley, in a concurring opinion, says: "The law was not in this case an invasion of property existing at the date of its passage, and the question of depriving a person of property without due process of law does not arise. No one has ever doubted that a legislature may prohibit the vending of articles deemed injurious to the safety of society, provided it does not interfere with vested rights of property. When such rights stand in the way of public good they can be removed by awarding compensation to the owner. When they are not in question a claim of a right to sell a prohibited article can never be deemed one of the privileges and immunities of the citizen."

Mr. Justice Field, concurring also in the opinion of the court, says: "The prohibition of sale in any way or for any use is quite a different thing from the regulation of the sale or use so as to protect the health and morals of the community. I have no doubt of the power of the state to regulate the sale of intoxicating liquors where such regulation does not amount to the destruction of the right of property in them. * * * No one has ever pretended, that I am aware of, that the fourteenth amendment interferes in any respect with the police powers of the state. Certainly no one who desires to give to that amendment its legitimate operation has ever asserted for it any such effect. It was not adopted for any such purpose. The Judges who dissented from the opinion of the majority of the court in the slaughter house cases never contended for any such position. But, on the contrary, they recognized the power of the state in its fullest extent, observing that it embraced all regulations affecting the health, good order, morals, peace and safety of society, that all sorts of restrictions and burdens were imposed under it, and that when these were not in conflict with any constitutional prohibition or fundamental principles they could not be successfully assailed in a judicial tribunal."

This decision of the supreme court of the United States would seem to so cover the question made under the fourteenth amendment that nothing further need be said. Counsel, however, call our attention to a decision of the circuit court of the United States for the district of California in a case involving the constitutionality of a revenue law of that state, in which the opinion was filed in September last. The case was that of the county of San Mateo *v.* the Southern Pacific R. R. Co., reported in 13 federal reporter, 723. We quote some portion of the opinion to which our attention is directed. Mr. Justice Field says: "The fourteenth amendment of the constitution in declaring that no state shall deny to any person within its jurisdiction the equal protection of the laws, creates a limitation upon the exercise of all the powers of the

state which can touch the individual or his property, including among them that of taxation Whatever the state may do it cannot deprive any one within its jurisdiction of the equal protection of the laws; and by equal protection of the laws is meant equal security under them to every one, on similar terms, in his life, his liberty, his property, and in the pursuit of happiness. It implies not only accessibility by him, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs and the enforcement of contracts, but also an exemption from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. * *. * Unequal exactions in every form, or under any pretense, are absolutely forbidden. * * * Taxation on business in the form of licenses may also vary according to the calling or occupation licensed and the extent of business transacted; but even then there must be uniformity of charges with respect to the same calling or occupation in the same locality. * * * It (the fourteenth amendment) does not, indeed, place any limit upon the subjects in reference to which the states may legislate. It does not interfere with their police power. Upon every matter upon which, previously to its adoption, they could act, they may still act. They can legislate now, as they always could, to promote the health, good order and peace of the community; to develop their resources, increase their industries and advance their prosperity; but it does not require that in all such legislation hostile and partial discrimination against any class or persons shall be avoided; that the states shall impose no greater burdens upon any one than upon the rest of the community under like circumstances; nor deprive any one of rights which others similarly situated are allowed to enjoy. It forbids the state to lay its hand more heavily upon one than upon another under like conditions. It stands in the constitution as a perpetual shield against all unequal and partial legislation by the states, and the injustice which follows from it, whether directed against the most humble or the most powerful, against the despised laborer from China or the proud master of millions."

We fail to discover in the paragraph quoted, or in any part of the text of the opinion referred to, that the fourteenth amendment places any obstacle in the way of the right of states to legislate in respect of the regulation of traffic in intoxicating liquors or the exercise of any of the recognized police powers. They remain as before the adoption of the amendment. The amendment requires that all citizens shall be amenable to the same laws. The argument that every man in the community has the right to engage in any kind of business he may choose, and that the legislature may not impose conditions in respect to the exercise of such right, especially in business that has always been the subject of police regulation and restriction, goes as well against the power of the state to impose any restriction, even the asking for a license, as against the conditions imposed by the act in question. The opinion of Justice Field in the California tax case agrees with that of all the justices in the case in 18 Wallace, that the fourteenth

amendment does not affect the police powers of the state, as they existed before the adoption of the amendment; nor the power of the states to impose taxes and regulations upon property or business, "provided they lay no greater burden upon any one than upon the rest of the community under the like circumstances; nor deprive any one of rights which others similarly situated are allowed to enjoy." See, also, Missouri *v.* Lewis, 11 Otto, 22, 31.

As was said by the court in Iowa (*in re* Ruth, 32 Iowa, 252), in regard to the license law of that state, a preventive restriction is thrown around the sale by permitting men of good moral character alone to deal in this article. Counsel exclaim: "Have not men of bad moral character the same rights as men of good morals?" Undoubtedly, all men are equal before the law in respect of the right of person and property, but every man who desires to engage in the business must submit to the terms prescribed by the law. Certain poisons are property, but the sale of them may be restricted to certain persons, namely: those having sufficient intelligence to know when they ought to be used, and of sufficient character for prudence to give assurance that these agents will not be carelessly administered. Intoxicating liquors have uniformly been held to be proper subjects of police surveillance, and the sale of them guarded and restrained by regulations prescribed by the legislature.

We find that the act of March 3d, 1883 (except sections five and six, which may be stricken out without impairing the efficacy of the act or the object of enacting it), is not obnoxious to any provision of the constitution of this state or of the United States.

The motion to quash the alternative writ is granted."

State *v.* Brown. January, 1883. 19 Fla., 593.

MINNESOTA ASSERTS HER POLICE POWER.

SUPREME COURT OF MINNESOTA.

"There is no possible distinction in this respect between refusing to grant a license and revoking one already granted. Both acts are an exercise of the police power. The power exercised and the object of its exercise is, in each case, identical, viz: to exclude an incompetent or unworthy person from this employment. Therefore the same body which may be vested with the power to grant, or refuse to grant a license, may also be vested with the power to revoke. The statutes of all the states are full of enactments giving the power to revoke licenses of dealers, innkeepers, hackmen, draymen, pawnbrokers, auctioneers, pilots, engineers, and the like, to the same bodies, boards, or officers who are authorized to issue them, such as city councils, county commissioners, selectmen, boards of health, boards of excise, etc. The constitutionality of such laws, as a valid exercise of the police power, has often been sustained, and indeed rarely questioned. Cooley, const. lim., 343 and 744, and cases cited."

State, etc. *v.* Board, etc. Dec. 24, 1885. Supreme court of Minn. 26 N. W. R., 124.

SUPREME COURT OF MASSACHUSETTS.

"MORTON, J. By the city charter of Boston, the city government has the "power to make all such needful and salutary by-laws or ordinances, not inconsistent with the laws of this commonwealth, as towns by the laws of this commonwealth have power to make and establish, and to annex penalties, not exceeding fifty dollars, for the breach thereof; which by-laws and ordinances will take effect and be in force from and after the time therein respectively limited, without the sanction or confirmation of any court or other authority whatsoever." St. 1854, c. 118, § 35. In pursuance of this power, the city government committee formed the ordinance under which these complaints were brought, which is as follows: "No person shall, except by permission of the said committee, deliver a sermon, lecture, address or discourse on the common or other public grounds." Rev. Ord., c. 37, § 11. This ordinance is not inconsistent with any law of the commonwealth, and we see no ground for holding it to be unreasonable and invalid. Its purpose is to promote the public peace, and to protect the public grounds from injury, and it is calculated to effect these ends without violating the just rights of any citizen.

The defendant's claim, that this ordinance has become obsolete, because the same or similar ordinance enacted in 1862 has not been enforced, and has been repeatedly violated, cannot be sustained. A statute or ordinance remains in force until it is repealed. The ordinance under which the defendant was convicted was enacted in 1882, and the evidence offered to show that the ordinance of 1862 had been disregarded or disused was immaterial, and rightly rejected."

Com. *v.* Davis. January 8, 1886, by supreme court of Mass. 4 N. E. R., 578.

CALIFORNIA ASSERTS HER POLICE POWER.

SUPREME COURT OF CALIFORNIA.

"The following *proviso* in the ordinance is also challenged: 'No license to keep a saloon or bar, or other place, for the sale of spirituous, vinous, malt or mixed liquors, shall be issued to any person until a permit in writing from the board of police commissioners authorizing such issue shall have been filed with the clerk of the council, and the board of police commissioners shall have power to issue such permit and revoke the same at any time, and after the filing of such revocation with the clerk of the council the said clerk shall issue no further license to the party whose permit is revoked, until a new permit be granted said party.'

"This condition, imposed upon persons entitled to licenses, affects only the operation of the ordinance, and not its existence. It is the mode prescribed for issuing licenses to persons who want to engage, or wish to continue in a licensed occupation. As mere mode the condition imposed is not more unusual or onerous than statutory law or local ordinance, passed in the exercise of the police power of the state, has frequently prescribed for other occu-

pations or professions. Says the supreme court, in *ex parte* Yale, 24 Cal., 242: 'The manner, terms and conditions of an attorney's admission to practice, and of his continuing in practice, as well as his powers, duties and privileges, are subject to legislative control the same as any other profession or business that is created or regulated by statute:' therefore the statute which required, as a condition to admission to practice, or to continue in practice, the taking of the oath prescribed was constitutional. So in *ex parte* Frazer, 54 Cal., 94, and *ex parte* Johnson, 62 Cal., 263, we held that a statute, passed to regulate the practice of medicine, which made it a misdemeanor for a physician to practice medicine without having first procured a certificate from a board of examiners, appointed by certain medical societies, was not subject to constitutional objection."

Re Guerrero, 9 W. C. R., 862, March 16, 1886, by supreme court of California.

The objections to the ordinance are two:

1. That it is *unreasonable*, the rule being that when a power to pass an ordinance is not given in *express terms*, but is derived from a general power to legislate, the ordinance must be reasonable. (*Ex parte* Chin Yan, 60 Cal., 78.)

2. That it violates state constitution, art. I, secs. XI and XXI, inasmuch as it is not uniform

Both of these objections seem to be answered by *ex parte* Moynier, referred to hereafter.

It is claimed, in answer to the prayer of the petitioner for a discharge, that the power exercised by the board of trustees was duly vested in that body, not only under the act approved March 13, 1883, but also under the provisions of the state constitution. We will confine ourselves to a consideration of the powers vested in the municipal corporation by the constitution, as that will be sufficient for the present case.

By section XI of article XI of the constitution it is provided: "that any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

In the case of *ex parte* Moynier, 65 Cal., 33, this court had under consideration an ordinance very similar in its provisions to the one now under consideration, and held that the power exercised by the board of supervisors of the city and county of San Francisco, fixing certain limits in the city for the carrying on of the laundry business, was properly exercised under the section of the constitution above referred to. The opinion in that case says: "that the regulations of the order are, as to portions (perhaps all), police regulations, and, as to some, sanitary, we have no doubt."

And in the case of Barbier *v.* Connolly, 113 U. S., 27, the supreme court of the United States, in a laundry case, says: "The fourth section, so far as it is involved in the case before the police judge, was simply a prohibition to carry on the washing and iron-

ing of clothes in public laundries and wash-houses, within certain prescribed limits of the city and county, from ten o'clock at night until six o'clock in the morning of the following day. * * * The provision is purely a police regulation within the competency of any municipality possessed of the ordinary powers belonging to such bodies." The case of Soon Hing *v.* Crowley (same volume, p. 703), which was also of the same character, lays down the same doctrine. Other cases might be referred to, but a decision of the supreme court of this state and two of the supreme court of the United States, holding such on ordinance to be a police or sanitary regulation, are deemed sufficient. We can see nothing unreasonable in the ordinance, but, on the contrary, good reasons may have moved the board of trustees to pass the order in question.

Writ dismissed and petitioner remanded.

MORRISON, C. J.

We concur:

MYRICK, J.,
SHARPSTEIN, J.,
THORNTON, J.,
ROSS, J.

Re Hang Kie, March 23, 1886, by supreme court of California, 9 W. C. R., ——.

We also refer to the following:

Rehberg *v.* mayor. June 9, 1885, N. Y. 2 N. E. R., 11.
Amperse *v.* Kalamazoo. January 13, 1886. 26 N. W. R., 222, 410.
Re Conway. Oct. 5, 1885, Pa. 1 At. R., 127.
W. L. Murfree, *Sen.*, leading article. February, 1886. 7 crim. law mag., 143–4.
Vanderlip and al. *v.* Derby. Feb. 10, 1886, Neb. 26 N. W. R., 707.
People *v.* Richmond. Feb. 3, 1886, Mich. Id., 770.
Re Bickerstaff, supreme court of Cal. April, 1886.

RE YICK WO, THE CASE AT BAR.

We are now brought to an examination of the decision in *re* Yick Wo, which is the case at bar. We mailed on March 23d, 1886, a full set of briefs, so that this court might know therefrom the matters which were before the court below. (The case of Wo Lee was submitted in the circuit court on a set of the same briefs.) We now produce a condensed copy of the decision in *re* Yick Wo, the whole of which will appear in the record, and may be found in 8 west coast reporter, on page 543:

Hearing on *habeas corpus*. The opinion states the facts.
L. H. Van Schaick and D. L. Smoot, for the petitioner.
Alfred Clarke and Oliver P. Evans, *contra*.

SEARLS, C. 1. Yick Wo, a native of China, came to the United States in 1861, and for twenty-two years last past has been engaged in the laundry business at 349 Third street, San Francisco.

2. Petitioner is an alien, and a subject of the emperor of China.

The petition for a writ of *habeas corpus* was filed August 24, 1885, and a writ issued returnable September 4, 1885. The return shows that petitioner is held by the respondent as sheriff of the city and county of San Francisco, under a conviction and sentence for a violation of section 1 of order 1569, and section 68 of order 1587 of the board of supervisors of the city and county of San Francisco.

Ordinance, or order No. 1569 of the board of supervisors, under which petitioner was convicted, is in the following language:

[This order is printed on page 3 of this brief, and need not be here repeated.]

Section 68 of order 1587, passed July 28, 1880, is in substance and effect the same as section 1 of No. 1569, quoted above.

It is admitted that the petitioner had a license, a certificate from the board of fire wardens, and a certificate from the health officer, copies of which are on file.

It is further admitted that petitioner applied to the board of supervisors, June 1, 1885, for consent of said board to maintain and carry on his laundry; but that said board refused said consent.

By section XI of article XI of the constitution of this state, it is provided that "any county, city, town or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws."

By section 74 of the act of April 19, 1856, usually known as the consolidation act, the board of supervisors is empowered, among other things, "to provide by regulation for the prevention and summary removal of nuisances to public health, the prevention of contagious diseases; * * * to prohibit the erection of wooden buildings within any fixed limits where the streets shall have been established and graded; * * * to regulate the sale, storage and use of gunpowder, or other explosive or combustible materials and substances, and make all needful regulations for protection against fire; to make such regulations concerning the erection and use of buildings as may be necessary for the safety of the inhabitants."

"Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all," says Chancellor Kent, "be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought to so use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community." 2 Kent's Com., 340.

Every citizen holds his property subject to the proper exercise of the powers and restrictions above referred to.

A large proportion of the laws and ordinances relating to the

comfort, safety, health, convenience, good order and general welfare of the inhabitants of cities and towns, and which we style police laws or regulations, have the effect, in a greater or less degree, to disturb and curtail individual enjoyment and personal rights.

For the injury which the citizen suffers, he is, in contemplation of law, compensated by his share in the general benefits flowing from the regulations found essential to the general welfare. It is but a reasonable restraint upon the use of property in those cases where its unlimited use or enjoyment would produce serious mischief to others.

The right to establish fire limits, and to interdict the construction of wooden buildings within certain specified bounds, is a familiar exercise of the authority usually conferred upon municipal corporations.

In towns like San Francisco, constructed largely of wood, the danger from fire is ever present and overshadowing.

It is not, therefore, strange that the legislature, in conferring certain powers upon the municipal authorities of the city, included not only the authority to regulate the erection, but also the use of buildings, so far as necessary for the safety of the inhabitants.

To prevent the construction of wooden buildings within the densely inhabited portions of a city may become an imperative duty on the part of the authorities. They may not destroy those already erected; but the use of wooden structures within given limits, for specific and highly dangerous purposes, may become quite as detrimental as the erection of new structures of the same character, and as the power of regulation extends to the use, as well as to the erection, of wooden buildings, we can discern no assumption of unwarranted authority in the order No. 1569, which interdicts the establishing, maintaining or carrying on laundries, except by consent of the board of supervisors, save in brick or stone buildings. The business of conducting a laundry involves a constant use of fires, under circumstances and, perhaps, by persons, liable to result in conflagrations; of these facts the supervisors are the judges.

In given instances, under favorable circumstances, the danger of fire from this business may be reduced to a minimum, or may not at all jeopardize the surrounding property. In this last class of cases, no objection can be seen why permits should not be granted, as provided for in order 1569. It has been the practice in municipal corporations to vest the granting of licenses for a variety of objects in the discretion of the corporate authorities, or some of them. Without such authority, boards of health and various other agencies by which the lives and health of citizens, and the safety and due enjoyment of their property are protected, would be powerless for good.

The argument that the discretion to permit the establishment of laundries in wooden buildings by the supervisors is liable to abuse, cannot be held conclusive. No doubt all power is liable to abuse, wheresoever lodged.

In theory, however, as well as in ordinary practice, the persons selected to discharge governmental duties, by reason of supposed qualifications for the several positions in which they are placed, will be found to possess the capacity and integrity essential to a proper administration of the trust reposed in them.

If they prove deficient in these qualifications the evil cannot be remedied by invalidating their acts, performed by virtue of authority vested in them, or, where they have exercised discretionary powers, by impugning their judgment or motives, rather than their right to exercise the discretion.

The board of supervisors, under the several statutes conferring authority upon them, has the power to prohibit or regulate all occupations which are against good morals, contrary to public order and decency, or dangerous to the public safety.

Clothes washing is certainly not opposed to good morals or subversive of public order or decency, but when conducted in given localities it may be highly dangerous to the public safety. Of this fact the supervisors are made the judges, and having taken action in the premises, we do not find that they have prohibited the establishment of laundries, but that they have, as they well might do, regulated the places at which they should be established, the character of the buildings in which they are to be maintained, etc.

The process of washing is not prohibited by thus regulating the places at which, and the surroundings by which, it must be exercised.

The order No. 1569 and section 68 of order No. 1587 are not in contravention of common right, or unjust, unequal, partial, or oppressive in such sense as authorizes us in this proceeding to pronounce them invalid.

It is next contended that order No. 1569 and section 68 of order 1587 are repealed by order No. 1767, adopted April 8, 1884, and which is in the following language:

[The full text of this order may be found in the certified opinion of the court below, also in 8 W. C. R., at page 552, also on pages 9 to 12 of petitioner's brief in court below, which we forwarded to Washington, to clerk of this court, March 23d, 1886.]

The rule for the construction of ordinances and orders of a muncipal corporation are the same as for the statutes of the legislature.

The civil code of this state (section xx) affords no guide for determining the question of the repeal of the acts of municipal corporations, except so far as its rules enunciate general principles, alike applicable to all statutory enactments, general and local.

The law does not favor the repeal of statutes by implication, and where there is an apparent conflict between two acts the court should reconcile them if possible, but if this cannot be done, then the last act must govern: Schofield *v.* White, 7 Cal. 400; People *v.* R. R. Co., 28 id. 254.

Where a subsequent statute is repugnant to a prior one, the latter operates, without any repealing clause, as a repeal of the former; or where not repugnant, if it clearly appears from the

latter that it was intended as a revision or substitute for the former, it will repeal it so far as revised or substituted: Pierpont *v.* Crouch, 10 Cal. 315.

In order for a subsequent act to repeal a former, it should appear from the last act that it was intended to take the place of or repeal the former, or that the two acts are so inconsistent that force and effect cannot be given to both: *ex parte* Smith, 40 Cal. 419; estate of Wixam, 33 id. 320; People *v.* Burt, 43 id. 560; People *v.* Sargent, 44 id. 430.

Section IX of the order No. 1767, expressly repeals "order No. 1691, and all orders or parts of orders in conflict with any of the provisions of this order."

It follows that order No. 1569 is not expressly repealed unless there is a conflict between its provisions and those of the later order or orders. We may dismiss some intermediate orders of the board from observation, for the reason that we find in them no support for the contention of petitioner not contained in No. 1767.

We fail to find in order No. 1767 evidence of any such repugnance or conflict with No. 1569 as to warrant the conclusion that the latter is repealed by implication.

They may, with propriety, both stand together. No. 1767 fixes the limits within which a public laundry or wash-house shall not be carried on without complying with certain conditions therein specified. These conditions relate to certificates to be procured from the health officer as to drainage and sanitary conditions, and from the board of fire-wardens showing the stoves, washing and drying apparatus are in good condition, and not dangerous to surrounding property from fire, etc.

The order also fixes and designates certain hours of the night within which ironing and washing shall not be carried on.

The prominent features of the order consists in the limits which it fixes within which certain restrictions apply. All of these provisions may with propriety be enforced, and the necessity still exist, in the densely settled portions of the town, for this business to be conducted only in buildings of brick or stone.

As order No. 1569 is not expressly repealed by order 1767, and as the latter is not repugnant to, or inconsistent with, the former, we are of opinion it did not repeal the former by implication, and that section I of order No. 1569 is still in full force and effect, and applicable alike to all classes and conditions of men engaged, or to engage, in the business therein indicated.

We have not deemed it necessary to discuss the question in the light of supposed infringement of petitioner's rights under the constitution of the United States, for the reason that we think the principles upon which contention on that head can be based have in effect been set at rest by the cases of Barbier *v.* Connolly, 113 U. S. 27, and Soon Hing *v.* Crowley, id. 703.

That this class of orders are not repugnant to our state constitution need not now be discussed, as their validity with reference to that instrument has been sustained in *ex parte* Mount, 5 West Coast Rep. 575; *ex parte* Moynier, 65 Cal. 33; *ex parte* Walters, id. 269.

A regulation which applies alike to all persons engaged in a given pursuit, without distinction as to nationality, residence, age, sex or condition, is not when otherwise regular and valid, subject to the criticism of being in violation of treaty obligations existing between the United States and China.

We are of opinion the petitioner should be remanded to the custody of the sheriff.

Belcher, C. C., and Foote, C., concurred.

By the court. For the reasons given in the foregoing opinion the petitioner is remanded to the custody of the sheriff.

We have in the above decision the findings of the supreme court of California on the important issues of fact presented by the record. Can this court say that the findings are against the evidence?

If the findings remain undisturbed can this court say that our supreme court erred in the interpretation of the law?

Unless error appears in the proceedings of the supreme court of California, the judgment in *re* Yick Wo must be affirmed, and if it is, the judgment in *re* Wo Lee must also be affirmed.

THE YICK WO AND WO LEE DECISIONS COMPARED.

We have already expressed our regret that there were not findings of fact (see page 9, *ante*), and it is within the possibilities that the important question which this case involves may go off on the side issue of practice in *habeas corpus* cases.

We are satisfied with the correctness of the position which we took in the court below. (See pp. 11–12 of this brief, *ante*.) It would seem that the circuit court viewed the facts differently from the view adopted by our supreme court. We quote from the circuit court decision:

"After that decision, the ordinance was amended by omitting the requirement of the assent of twelve citizens and taxpayers in the block; but it still prohibited carrying on a laundry business, after complying with numerous onerous conditions, without in addition "having first obtained a license or permit therefor, duly granted by resolution of the board of supervisors." It prescribed no specific conditions, the performance of which should entitle the party to a license or permit; but the license or permit, after performance of all the other prescribed conditions, still depended upon the will or pleasure of the board of supervisors. It simply struck out the consent of the twelve taxpayers on the block, and left it to rest upon the consent of the board alone, thereby limiting the number of parties to the consent, without abandoning the principle."

Re Wo Lee, 9 W. C. R., 82.

Upon inspection of the order 1569, now under examination, it will be seen that it was passed May 26, 1880, and that order 1679, passed June 10, 1882, was the order considered in Quong Wo, 7 Saw., 531. It is apparent that order 1679, passed June 10, 1882, and declared invalid July, 1882, could not have been "*amended*" "*after that decision*" by the passage of order 1569 on the 26th of May, 1880.

We quote from the above extract:

> "*The license or permit, after the performance of all the other prescribed conditions, still depended upon the will or pleasure of the board of supervisors.*"
>
> *Re* Wo Lee, 9 W. C. R., 82.

This extract shows that the circuit court may have supposed that there were other conditions "prescribed," and perhaps referred to the conditions referred to in the "uncontradicted petition."

Wo Lee, 9 W. C. R., 83.

In the decision *re* Yick Wo (the case at bar), on pages 552–4 of 8 W. C. R., (see pp. 89–93, *ante*,) will be found the text of order 1767, which does prescribe some conditions to be complied with, within certain limits; but the limits are not the same as those affected by order 1569. Moreover, order 1767 was passed April 8, 1884, while order 1569 was passed nearly four years earlier—May 26, 1880.

At the time of the passage of order 1569 there were no "other prescribed conditions" to be complied with, except the abatement of the scaffold on the roof.

Vide § 2 of order 1569, on page 3 of this brief.

The question of the peril or safety of the adjoining property as to risk of conflagration was to be decided by the board of supervisors, on inspection of the premises or other evidence.

See opinion of Wilson, judge, pp. 5–9, *ante*.

If it had been true, as intimated by the circuit court, that the other regulations which have since been passed (viz., orders 1719–1767, *vide* page 10, *ante*) were adopted and *obeyed before* the passage of order 1569, there would be much force in the reasoning of the circuit court; and here, again, we find the influence of the "uncontradicted petition."

The petitioner alleges (§ 4, p. 3 of petition) that he "has scrupulously complied with every revenue, health, fire and police regulation," etc.; while "the notorious public and municipal his-

tory of the times" (we quote from Wo Lee, 9 W. C. R., pp. 84–85) is evidence that up to the time of the decision of this court in Barbier *v.* Connolly, January 5, 1885, and Soon Hing *v.* Crowley, March 16, 1885, the chinese laundrymen successfully resisted every order passed for the regulation of their business.

Again, we find in the circuit court decision:

> And the uncontradicted petition shows that all chinese applications are, in fact, denied, and those of caucasians granted—thus, in fact, making the discriminations in the administration of the ordinance, *which its terms permit.*
>
> *Re* Wo Lee, 9 W. C. R., 83–84.

We earnestly insist that we are not responsible for the untruth of the petition, nor are we required to contradict such petitionary allegations. We deny discrimination.

How can we be responsible for the credulity of the petitioner, or his reckless allegations? We have already shown, p. 27–28 *ante*, that the Tung Hing Tong pleaded before our supreme court that this order was in force and obeyed, and therefore that order 1719 was unreasonable.

Can associations like the Tung Hing Tong be permitted thus to attempt to mislead our courts, or by a change of attorneys to escape responsibility for such contentions?

With proper deference, we submit that the order does not "mean prohibition as to the chinese," (Wo Lee, 9 W. C. R., 85) because the weight of evidence is the other way. We showed in the court below (*vide* p. 16, *ante*), that no prohibition is enforced against the chinese in the licensing of intelligence offices, or the use of steam, although such power exists. We show by our photographic exhibits that the objectionable scaffolds on the roofs still remain.

Since the decision of Judge Wilson, July 1, 1885, pp. 5–9 *ante*, the power of the city to enforce this order has been limited only by her moderation.

Why should we want to destroy the chinese laundry business? Do we not voluntarily give them our clothes to wash? Have we not given them three-fourths of the laundry business of San Francisco? We take them into our families as cooks and butlers, and into our churches and sunday-schools, and they sleep with us (temporarily) in our cemeteries.

An attempt was made to restrain by injunction the enforcement of this order, and the injunction was denied January 20, 1886.

Yick Wo *v.* Crowley, 8 W. C. R., 715.

The existence of the power to enforce this order has been indisputable since July 1st, 1885, *and if "the purpose was to drive out the chinese laundrymen,"* as assumed by the circuit court (*Re* Wo Lee, 9 W. C. R., 85), *we ask why it has not been done?*

San Francisco is proud of her public buildings, her architecture, her parks, her schools and colleges, her public benefactors and their munificent gifts, and must she be forever afflicted, imperiled and disgraced by these rookeries and fire-traps with scaffolds on the roofs? Have we not suffered this nuisance long enough? Is there to be for us no day of better things? Will the federal court chain us to the annoyances described in pages 21 to 24 *ante*, and compel us in each case to bring an action for injunction?

San Francisco has had power to regulate these laundries and power to suppress them within certain limits which she may herself define (*re* Hang Kie, by supreme court of California, March 23, 1886, p. 87–8, *ante*), and this power has been possessed by the city of San Francisco since January 1st, 1880.

It is evident that these laundries existed in San Francisco during all this time. Now, if the purpose of the supervisors of San Francisco "meant prohibition as to the chinese," we ask why the purpose was not accomplished?

We say that the city did not mean to prohibit, did not mean to suppress this useful business, but simply meant to regulate it so as to secure the safety of the city. The contrary view leads to the curious conclusion that for six years the chinese laundry association has been superior in strength to the local government of San Francisco.

This petitioner, who says he "has scrupulously complied with every police regulation" of the city, further says, that in 1880 this order was passed "to deprive him of liberty and property without due process of law, and to deny him the equal protection of the law, and to discriminate against him, contrary to the fourteenth amendment, § 1977 R. S. U. S., and the treaty with China."

Now, if the purpose in 1880 and ever since was to "drive out the chinese laundrymen" (Wo Lee, 9 W. C. R., 85), we ask again, *why has it not been done?*

Was it because there was not time? The answer is that the period was six years.

Was it because we had not power? The answer is that all the power of the state was arrayed by article XI, section XI, of our constitution in our support.

Was it because we were not so disposed? The accusation is that we were so disposed.

Was it because we feared a restraining order from the federal court? The answer is, the federal court refused to grant such an order. (Yick Wo *v.* Crowley, 8 W. C. R., 715.)

These reflections tend to show that regulation, and not suppression, is the object of the order, and that it is untrue that the purpose of the supervisors was to drive out the chinese.

But our ingenious and talented adversary has incorporated in the evidence a license, a certificate of the fire wardens, and a certificate of the health officer. We apprehend that the effect of these papers was a question which pertained to the judicial power of the state. But we are ready to submit our response to the scrutiny of this court. We presume this court will take the case as it came from the court below, and therefore we produce an extract from

OUR BRIEF IN THE COURT BELOW:

> Our ingenious adversary (p. 1) refers to Yick Wo's license. This identical plea was made by Soon Hing, and branded bad by the supreme court of the United States. (113 U. S. R. 703.)
>
> Our ingenious adversary refers (p. 1) to the certificate of the fire warden. We reply that the certificate was given, as appears by its date, March 3, 1884. The application to the supervisors was made in June, 1885.
>
> It would be quite consistent with all the evidence before this court to suppose that there was no scaffold on the roof when the certificate was given. The refusal of the board of supervisors in July, 1885, was justified by the erection of the scaffold on the roof, as shown by our "exhibit one."
>
> Our ingenious adversary (p. 5) would have this court believe that "Yick Wo and 200 of his countrymen have been refused consent, and all others (caucasians), except one, were granted." Shed a little more truth on this statement, and the argument is pitiable. The "all others" are two, and no more. (See p. 9, *ante*.)
>
> Our ingenious adversary insists (p. 6) that "§ 68 pulls down or destroys Yick Wo's house without compensation." In reply, we remark that we took a photograph of this house since this writ was issued (see our "exhibit one"), and we think the house is there yet. It does not destroy Yick Wo's business, because he can transfer his business to a brick house.
>
> Our ingenious adversary quotes (p. 6) § 74 of the consolidation act, and on pp. 7 and 8 cites some fifteen authorities to sustain his construction.
>
> We have on pages 9 to 16, *ante*, shown that San Francisco has

NOTE.—The references are to the brief filed by petitioner in the supreme court of California. We filed a set of these briefs in this court about March 29, 1886.

imperial power, and we say the decisions applicable to mushroom corporations do not affect us.

Our ingenious adversary quotes (pp. 9 to 12) order 1,767. We would say that, as a matter of practice, he should have pleaded the order. The supreme court does not take judicial notice of municipal orders, and as the very learned counsel has seen fit (p. 41) to criticise our citation of judge Hunt's opinion, and the insurance and real estate statistics, we think we are authorized to remind him that his incorporation of order 1,767 in his brief, is not less impertinent than our incorporation of judge Hunt's photograph of a laundry, and the insurance and real estate statistics which we furnished.

We are in pursuit of truth, and if the court is willing to receive order 1,767 from counsel's brief, when not pleaded, as it should be, we offer no objection, but, in a spirit of fraternal kindness, we might say to our very learned and talented opponent, quoting his own words, that we do not know (p. 41), "under what rule it is introduced, and why does it appear for the first time in the brief" of the counsel, when he should have pleaded it?

If order 1767 has repealed § 68, we are desirous to know it, and we waive our brother's irregularity, if irregular he has been. Yes, we will do more than that, for we do now expressly call the attention of this court to the decision of the superior court of San Francisco, May 7th, 1881, which holds § 68 to be unconstitutional, which is printed on page 3 of brief of Hon. A. C. Searle, in *re* White, No. 20,082, which is reported in 6 w. c. r., 644. Why our learned adversary left this decision like a gun abandoned on the march, we are not informed; but, unwilling to win a decision by taking an unfair advantage, we supply our enemy with a team and limber up this old gun, in order that it may be brought into action against us, and that we may receive its fire.

Our ingenious adversary contends (p. 12) that order 1767 repeals § 68.

We reply, that this court has not so held in *re White*, 6 w. c. r., 644.* The attorney for the *Tung Hing Tong*, who was under the strongest obligation "never to mislead the court by an artifice or false statement of fact or law" (c. c. p., § 282), told this court in January, 1884, *vide* p. 19 of brief of *amicus curiæ*, in *re* Moynier, that § 68 was in force and obeyed. How can the *Tung Hing Tong* repudiate this solemn admission of its attorney-general? We think that the labored argument on pages 13 to 15 of our opponent's brief about the repeal of § 68 is easily answered, as we have already shown, pages 4 to 9 of appendix to our points and authorities.

*Note.—We filed all the laundry orders in this court in *re* White, No. 20,082.

Our ingenious adversary quotes (pp. 16–17) order 1679, but he omits to say that this order was exploded by the circuit court,

---

Note.—The references are to the brief filed by petitioner in the supreme court of California. We filed a set of these briefs in this court about March 29, 1886.

August 7, 1882, *re* Quang Woo, 7 Saw., 526, and, being unconstitutional, order 1,679 did not repeal any previous order. Portland *v.* Schmidt, 6 w. c. r., 40.

Our ingenious adversary denounces (p. 17) the legislation of the municipality as "partial, pernicious and sinister," but we would remind him that it is easier to use these words than to prove them to be true. Where are his proofs. Have not these charges been exploded by the supreme court of the United States? (113 u. s. r., 703.)

A prosecutor, more impulsive and less cool than the gentleman to whom we now reply, drew the indictment which the *Tung Hing Tong* preferred against the municipality of San Francisco. For bitter accusation, unsustained by proof, we believe it is without precedent. The argument framed to support it is notable for its reckless statements regarding the motives of the supervisors and their evil purpose to unjustly discriminate against the chinese (see pp. 20–22 *ante*) and yet, upon their own showing, enforced by the activity of their industrious attorney in Washington, the supreme court held the charge to be untrue. There was no unjust discrimination.

There is no evidence to impeach the legislation. The more it is examined the more surprising is its moderation.

Would any city in China tolerate an invasion of Americans setting up a *Tung Hing Tong* in opposition to the local government, and the location of 300 firetraps all over the city, thereby jeopardizing the safety of life and reducing the value of property?

This kind of behavior received the notice of the government in the country whence we derive our language and the body of our laws, and a *premunire* was evolved for its correction.

Our ingenious adversary (pp. 18 and 19) demonstrates the dangerous power of the *Tung Hing Tong*, showing, as he does, that its enormous wealth enables it to secure superior legal talent. We compliment our learned opponent on his skill, as shown by his argument in chapter 3 of his brief, but we modestly contend that the authorities cited (pp. 18 and 19 of petitioner's brief) are not applicable to San Francisco under our new constitution, as we have already shown (pp. 9 to 12 *ante*). The case of Marini *v.* Graham, 6 w. c. r., 766, clearly recognizes the power of the supervisors to legalize an encroachment on the street.

Much stress is laid on the fact that 200 chinese have been arrested for conducting laundries in wooden buildings. The evidence before this court shows that the non-chinese laundries are without scaffolds on the roof, while the chinese insist in maintaining these forbidden erections.

For our part, we are content when a task is imposed on us to follow the ancient rule of beginning in the right place. The police department, in attempting to enforce the laundry order,

---

Note.—The references are to the brief filed by petitioner in the supreme court of California. We filed a set of these briefs in this court about March 29, 1886.

have not perpetrated the absurdity of arresting some harmless widow who had no scaffold on her roof (*vide* § 2 of order 1,569, p. 1, of respondent's points), but finding scaffolds on the roof of Yick Wo, and 200 of his countrymen, they arrested them, and, in place of obedience and submission to the law, we are confronted with organized resistance and a *Tung Hing Tong*.

If the police department had, oblivious of its duty, begun the campaign by arresting some 50 poor widows who had no scaffolds on their roofs, and ignored the 300 firetraps with scaffolds on the roofs, the charge of discrimination (whatever that may mean) might be well founded. But we say that if Yick Wo would take the scaffold off his roof and comply with the law, and sever his connection with the 3,000 persons controling a quarter of a million of capital organized to resist the law, he would stand better before our courts of justice.

Our ingenious adversary wields (p. 20) "the pruning knife." We would remind him that the *Tung Hing Tong* came down on our municipality before the pains of parturition under the new constitution had ceased, and with its pruning knife, held by judicial hands, emasculated the municipality. (*vide* People *v.* Ah Ling, p. 3, brief of Hon. A. C. Searle, *re* White, No. 20,082, w. c. r., 644.)

The victorious *Tung Hing Tong* found itself independent of, and unaffected by, the municipal legislation which had been set aside by the courts. The municipality attempted other legislation. The *Tung Hing Tong*, exulting in its success, mocks the weakness of which it was the cause, and taunts the municipality because, when dazed and crippled, its legislation was abortive.

We find, on page 5 of petitioner's brief, the following: "Why, in the face of subsequent legislation by the supervisors, its [§ 68] revivification should be sought now, is a matter of conjecture with only a few." What meaning may be hidden in this obscure suggestion, we may not know.

We think the truth is shameful enough. The city was worsted in her conflict with the *Tung Hing Tong* over § 68 (May 7, 1881). Again the city tried, and again she was defeated, over order 1679 (Aug. 7, 1882). Again she tried (order 1691), again she acknowledged her defeat (June 25, 1883). Again she tried (order 1719), again she was defeated (decision *re* Woo Yeck, Alameda county, Dec., 1883) over order 1719.

But it is one of nature's laws that action and reaction are reciprocal, and in the Moynier case this court, on February 8th, 1884, restored to the city the authority which had been wrested from it by the *Tung Hing Tong*.

Obedience and submission were not yielded by the *Tung Hing Tong*, but a more energetic resistance and a defiance of the courts, by blockading them with jury trials, followed.

But the *Tung Hing Tong* could not govern San Francisco for-

NOTE.—The references are to the brief filed by petitioner in the supreme court of California. We filed a set of these briefs in this court about March 29, 1886.

ever, and as the courts, one after another,* recognized her rights, she has attempted to enforce her laws, and is now taunted with her weakness by those whose feet have trampled on the law.

*NOTE.—*Re* Moynier, supreme court, Cal. (dep't 2). February 8th, 1884.
Re Soon Hing, supreme court, Cal. (in bank), March 13th, 1884.
Barbier *v.* Connolly, supreme court, United States, January 5th, 1885.
Soon Hing *v.* Crowley, supreme court, United States, March 16th, 1885.

Our ingenious adversary, pp. 20–24, builds a man of straw and then successfully demolishes his own creation. "A laundry on the sea beach." (p. 20.)

What about a slaughter house or a powder mill on the sea beach where our wives and children go to see the works of God. Where the toilers of the week on a Sunday go to see the grand Pacific kiss the golden vesture of our sunset coast.

Emasculated as the city has been by the *Tung Hing Tong*, we retain sufficient energy to raise a cry of alarm before the *Tung Hing Tong* drives us from our homes into the ocean. We do not dispute the authorities cited (pp. 20–24) by our opponent, but we say they are not applicable to our case, as we have already shown, pp. 9–16, *ante*.

Our ingenious adversary (pp. 25 to 27) dilates about the consolidation act, but cautiously abstains from referring in chapter 5 of his very able brief to § XI of art. XI of the constitution. And, having sufficiently alarmed himself, he retires as the curtain falls, placing "Caligula" to the front.

We concede all that our opponent claims as to the incapacity of the legislature to make that a nuisance which is not a nuisance. But what has that to do with the Yick Wo?

He was not convicted of nuisance. His fire-trap endangers the safety of the city, and we want him to get into a brick building before he burns the city.

Can the city do nothing but abate nuisances after they have poisoned her air and destroyed her values? Can she do nothing in the way of prevention or regulation?

Our ingenious adversary (pp. 28 to 44) indulges us with the sublime doctrines of the declaration of independence, the 14th amendment, the civil rights act of congress and the constitution of California. These great land marks of human progress are our refuge and strength, a very present help in time of trouble, and therefore will we not fear. So long as we can discern these great pledges of human rights, we will abide with confidence in the protection of our courts, and although the *Tung Hing Tong* with profane and polluted feet has trampled on our laws, the day of restoration is coming and the darkness of the night of subjugation will be forgotten in the effulgence of the day of deliverance.

Our very learned and talented opponent has evolved (p. 41) "a vital and pregnant question of discrimination raised by this petition," which, we think, shows that he has cut loose from legal

NOTE.—The references are to the brief filed by petitioner in the supreme court of California. We filed a set of these briefs in this court about March 29, 1886.

moorings, and is drifting, without chart or compass, on the pathless waters.

Did not the *Tung Hing Tong* discriminate in favor of their talented counsel when they selected them out of hundreds of attorneys to receive their royal retainers?

We claim the order does not discriminate, because it deals with all on the same terms; and if wooden buildings are permitted to whites, they will, on the same terms, be permitted to chinese, as we have shown (pp. 13–14, *ante*.)

Both of the only two laundries which have permits under § 68 employ 110 chinese.

We claim that the legislative power may distinguish between buildings which are highly dangerous and those not dangerous, and avoiding any distinction founded on race, color or religion or politics, guard the safety of the community while they assure to all equal rights on equal terms.

More than this, the *Tung Hing Tong* should not expect, and more than this the city has not attempted.

Is there no difference between a dangerous fire trap, with a scaffold on the roof, in which ten toilers jostle each other in the labor of the laundry "as many hours a day as nature will permit, by relays of help, the whole 24 hours of each day, continuously, Sundays included" (page 17 *ante*), where "most offensive and noxious odors are emitted, and noises are protracted far into the night,* and the fire is not quenched"—and the industrious widow, who, without a scaffold on the roof, and in a building reasonably fit for human habitation, as improved by civilization, labors for her own support, and, perhaps, the support of her children? She does not endanger the neighborhood by fire at night, or disturb the rest of any.

*Note—See opinion of Judge Hunt, pp. 5 to 9 of our points.

Our ingenious adversary asks (p. 41), "What has Dolliver's assevertions to do with this case?" We reply, quite as much as the untruthful assevertions of Yick Wo in his petition. Quite as much as orders 1,767 and 1,679, which counsel have not pleaded, although they put them in their brief. Quite as much as "Caligula," and quite as much as the conclusions of counsel, which are not supported by the evidence.

Our ingenious adversary asks (p. 42): "Upon what ground and for what reason is clothes washing punished?"

We reply that the legislative power ought to prevent crime, sickness, devastation, destruction and demoralization by removing or suppressing the causes of these evils.

To prevent burglary we may prohibit the carrying of burglar's tools, to prevent murder we may prohibit the carrying of concealed weapons, to prevent the common law misdemeanor of continuous loud and repeated blasphemy, we may prohibit a single utterance of profane language: *re* Delany, 43 Cal., 479; and to

---

Note.—The references are to the brief filed by petitioner in the supreme court of California. We filed a set of these briefs in this court about March 29, 1886.

prevent conflagration we may prohibit laundries in wooden buildings: *re* White, 6 w. c. r., 644.

As we expected, our very learned opponents disparage the decision in *re* White, 6 w. c. r., 644, and thus support our surmise that the *Tong Hing Tong* is unwilling to brook the control of our American courts. It is an alien and hostile tribunal, working in secret and of immense power. It is able, regardless of expense, to hire the best talent at our bar. It has not respected the decisions of this august tribunal, and if this case is decided against it, as we believe it will be, we hope (contrary to our experience in previous cases) it will not endeavor to defeat the enforcement of the law pending the contemplated proceedings in the supreme court of the United States.

Having reached the end of the very able brief of the ingenious counsel, we find that it closes as it begins, with a reference to "the petition." We think we have shown (p. 4, *ante*) that the petition does not prove itself.

But we say: Even if the contention of our ingenious adversary, that the supervisors cannot give a consent to one which is not given to another, were correct, the order would be valid, because it is only the invalid part of a statute which is set aside by the courts.

Yick Wo cannot borrow the grievances of 200 other Chinamen and import them into his case. Let each one take down the scaffold, and each will be fairly treated, as we have already shown, page 14, *ante*. Provisos and exceptions are quite common in legislation,* and admitting, for the sake of argument, that the supervisors had no power to grant an exception to the order, the petitioner can take no advantage from this fact. Suppose the supervisors should not grant any consent to any laundries, then the petitioner could not continue his present wooden laundry. The only consent given by the supervisors is in favor of one laundry, where 40 Chinese are employed, and another where 70 Chinese are employed. Do these facts show discrimination?

*Note.—See Bishop on statutory crimes, §§ 57-58, for numerous citations of exceptions.

CONCLUSION.

Were it not for the wealth and power of the *Tung Hing Tong*, and the brilliant talent of opposing counsel, this argument should have been much shorter.

It is not the fault of the respondent that the petitioner has hung the dragon flag of the Chinese empire over his door, and dared the municipality of San Francisco to touch it.

We have in this case 19 pages of printed petition and 44 pages of petitioner's brief.

Strip this case of its imported features; disconnect it with the *Tung Hing Tong*; remove the disturbing elements of luminaries of

---

Note.—The references are to the brief filed by petitioner in the supreme court of California. We filed a set of these briefs in this court about March 29, 1886.

the law of superior ability distributing themselves on 44 pages of printed matter, and we might have submitted our case without briefs and without argument. But, in the presence of such puissant opposition, we should be untrue to the court, as well as untrue to our cause, if we did not present, not only the decided cases, but the argument, the common sense view of the facts in this case, so as to assist the court to understand the subject, and thus correctly to declare the law.

The issues involved are important, and may decide whether the city of San Francisco can protect its taxpayers from destruction by fire.

We believe that it can, and we say that the order under examination is not—

a. Invalid.
b. Inoperative.
c. Unreasonable.
d. Discriminative; or,
e. Repealed,

as alleged by the petitioner.

1. We argue that upon the contention of the petitioner and respondent, the order is not (*a*) invalid.

2. We think the arrest of petitioner shows that the order is not (*b*) inoperative.

3. We admit that the *Tung Hing Tong* has decided that the order is (*c*) unreasonable, but we respectfully suggest that no judicial power has been reposed by the state of California in the *Tung Hing Tong*, and, therefore, its decisions are not authority in our courts of law.

4. We claim that we have shown that the order is not (*d*) discriminative in any odious or invidious sense, and that the contrary opinion has no foundation other than the credulity of a chinaman whom we have protected and fed for 22 years.

5. That the order has not been (*e*) repealed.

We have called the attention of this court to the adverse decision of the superior court, May 7th, 1881, not cited by our adversary, and, with equal fairness, we call attention to the decision of the same court, July 1st, 1885. We will say that the counsel for the *Tung Hing Tong* did not appear in the latter case, but as (we have already shown) the *Tung Hing Tong* does not bend its neck to the decision when it does participate in the discussion, we do not think that circumstance militates against the value of the decision.

The decision to which we refer is by a jurist whose judgment has been sustained by this court in *re* Robb, 64 Cal., 431, and the supreme court of the United States in same case, 111 U. S. R., 625; also by this court in *re* Moynier, 65 Cal., 33; *re* Soon Hing, March 13, 1884 (not reported), and the supreme court of the United States in Barbier *v.* Connolly, 113 U. S. R., 27.

The *Tung Hing Tong* disparages the decision, as it does the decision of this court in *re* Moynier, 65 Cal., 33, and *re* White, 6 W. C. R., 644, saying the first was not well considered, and the second was not a real contest (*vide* p. 44 of petitioner's brief). The statement is not verified, or supported by proof, and we presume this court will give it such value as it deserves.

Review of plaintiff's points and authorities.

1.

Under "first proposition of FACT [it is claimed] the records show invalid legislation and damaging discrimination against the petitioners and all subjects of China similarly situated."

This proposition we earnestly deny. It is not true. The decision in *re* Yick Wo says it is not true. We find on p. 16 of petition for rehearing that petitioner says "the record admits that this order was aimed exclusively at the chinese race, and in its workings and operations binds and oppresses them alone." We ask where in the record is any such admission made? We are aware that petitioner relies on his "petition" for proof of facts which were not proved and were not true. We have presented our contention as to the issues in this case on pp. 11 and 12 of this brief. There is a great gulf of difference between us as to the effect or value of our admissions. Of course if we had made such an admission the order could not be sustained unless the chinese were the only offenders. But suppose that all our white fishermen abstained from catching the very small fish, having some regard for the future of our fisheries, and suppose the chinese, having no regard for such future, should catch all the small fish and export them to China, would a law for the protection of our fisheries be held invalid because "it was aimed exclusively at (the offenders, they being known to be of) the chinese race, and in its workings and operations affected them alone."

As to the effect or value of our admissions we consider the Yick Wo decision to be in the nature of a set of findings on the facts before the court. We refer to the record, "*the opinion states the facts.*" (See p. 88, *ante.*) The admissions themselves are a part of the record. We have carefully complied with § 1484 of penal code and § 760 of R. S. U. S. We beg the court to notice that admissions 8, 9 and 10 are all governed by an objection and exception to their admissibility which precedes admission 8, *vide* p. 11, *ante.* We did not admit that all non-chinese laundrymen had petitioned, and the fact was that they had not. There were not more than two petitions in from white laundrymen, and as we have seen, one employed 70 chinese and the other 40 chinese. In this case we seek nothing more than justice and we are willing to aid the court by admitting

everything which is true, but we ask the court not to accept without examination the statement of petitioner as to what we admitted or what the records show.

UNDER II OF PLAINTIFF'S POINTS,

we take issue with plaintiff. No such result was proved; no such result exists. The cases cited against us are the following printed in italics:

Wo Lee v. *Hopkins* [the case at bar]. Yick Wo *v.* Hopkins is our answer. (8 W. C. R., 548, pp. 89–93, *ante.*)

Tie Loy, 9 W. C. R., 387. We refer to *re* Hang Kie, March 23, (pp. 87–8 *ante.*)

These cases are in direct conflict, and tend to show the importance of the questions we are discussing. In *re* Tie Loy the United States circuit court held invalid an order of the city of Stockton prohibiting laundries within certain limits. In *re* Hang Kie our supreme court in bank held a similar order of the city of Modesto to be valid.

The 14th art. of const. U. S., § 1977 R. S. U. S.

We reply we have not violated either.

The treaty with China, 1868–1881. We have not attempted to disregard it.

Re Quong Wo, 7 Saw. 526. We have discussed it.

We admit and admire the gospel of the Quong Wo case, 7 Saw., 526: "That the petitioner (a chinaman) has the right to follow any of the lawful ordinary trades and pursuits of life without let or hindrance from the state or any of the subordinate municipal bodies, except such as may arise from the enforcement of equal and impartial laws."

We say that the order now in issue has no taint of such inequality or partiality.

If the people of San Francisco desire to prohibit the erection of wooden buildings, they have a right to do so. They have a right to prohibit the maintenance of laundries in wooden buildings on account of danger of fire.

If permits are given to any whites under this order to maintain laundries in wooden buildings, the same permission must be given under the same circumstances to the chinese. Suppose the board of supervisors grant no permits, the effect of the order would be impartial. It would transfer the laundry business from wooden to brick buildings. This is a wise and beneficial change, and will the federal court say that we may not make it in the manner proposed?

If it should appear after this order had gone into effect that it was operated unequally and partially against the chinese on account of their *race or nationality*, there is a remedy provided by § 1979, R. S. U. S. in a civil action. There may never be any occasion to bring such an action because there may be no cause of action given.

Would it not be better for our chinese friends to try to conform to our municipal regulations in place of waging this interminable litigation? The only permits given as yet are in favor of two laundries employing 110 chinese.

Re Parrott, 6 Saw., 394. The decision appears to be distinguishable in this, that in Parrott's case there was discrimination against the chinese, patent on the face of the law; in this case there is no discrimination, latent or patent.

Henderson v. *Mayor*, 92 U. S. R., 268. We reply that "the natural and reasonable effect" of this order is to transfer the laundry business from combustible wooden buildings to non-combustible brick or stone buildings, which change will be of great advantage to the city of San Francisco and is necessary for her preservation. Therefore this case is not against us.

Cummings v. *Mo.*, 4 Wall., 320. This case is not against us. We have not used "indirect" or any means to injure the chinese.

Chy Lung v. *Freeman*, 92 U. S. R., 279. We are entirely in accord with this case; the "effect" of this order is to secure the safety of the city from fire.

We say that these three cases do not affect us. We are not even censurable under any of said cases.

Strauder v. *W. Va.*, 100 U. S. R., 303. Of course, that jury law of West Virginia was against the fourteenth amendment, but what has that to do with this case?

Re Virginia, id., 339. Because judge C. of Virginia violated the constitution, it by no means follows that we have violated it. We suppose he intended what he did. We intend to deal justly with each other, with the petitioner, his countrymen and all strangers within our gates. It does not follow that if the state of Virginia was tardy in acknowledging the civil rights secured by the fourteenth amendment, we should be convicted of violating the same instrument when we have not done so.

Neale v. *Delaware*, 103 U. S. R., 370. This case, like the last, is by no means against us. We consider it inapplicable.

Bush v. *Kentucky*, 107 U. S. R., 110. This case, like the last three, is a good authority for us. To the fourteenth amendment we

are loyal to the core. It should not be a matter of surprise that in Virginia, Delaware and Kentucky many persons were slow to accept the altered condition which the fourteenth amendment introduced. But what has that to do with us?

We say that none of these cases bear against us. They pronounce a law which we have not violated.

Re Frank, 52 Cal., 610, was delivered under the old constitution. Our case is under the new constitution. Our state supreme court held the sample sellers' license order to be invalid. We find no fault with this decision. In *re* Yick Wo (the case at bar) our supreme court holds the order to be valid. How does the Frank case apply to this?

Barbier v. *Connolly*, 113 U. S. R., 27, and *Soon Hing* v. *Crowley*, id., 703, are cited against us. We are confident that we are safely within the reasoning of these great leading cases.

Stone v. *F. L. & T. Co.*, 6 S. C. R., 346, is cited against us. We cited this case p. 34, *ante*.

UNDER III OF PLAINTIFF'S POINTS,

the question of attainder is referred to. As this question was not raised in the court below it will not be considered here. We think there is no merit in the point.

UNDER IV OF PLAINTIFF'S POINTS,

the question of deprivation of property, without due process of law, is presented.

This is a proper federal question, and it is the essence of this case. Petitioner cites Baltimore *v.* Radecke, 49 Md., 217, and Yates *v.* Milwaukee, 10 Wall., 497–505.

We say these cases do not militate against us. We have already discussed Baltimore *v.* Radecke (pp. 39–42, *ante*). Yates *v.* Milwaukee is inapplicable. We have not condemned petitioner's wharf. We want him to remove from a wooden building a dangerous business, and carry on the same in a brick or stone building, because the proper authority, viz: the local legislative power has decided that this change is necessary to secure the safety of the city, as well as the safety of petitioner. This involves a small expense, which petitioner declines to incur. Hence all this trouble. The petitioner wants to jeopardize his own safety, as well as the safety of the city, and the citizens thereof, by pursuing his business in a wooden building, and we want this jeopardy to cease.

SAN FRANCISCO, Cal., April 3d, 1886.

THE TRANSCRIPTS RECEIVED.

We have just received printed copies of transcripts in both cases. If they had been prepared in the same order they would have been more easily understood. Upon examination it will appear that Yick Wo, on the 24th of August, 1885 (*vide* file mark, folio 26, page 9 of transcript), obtained a writ of *habeas corpus*. That a writ was issued and served (*vide* folios 58–9, page 20, transcript) and returned (*vide* folio 60, page 20, to end of folio 98, on page 31 of transcript).

There is an inappropriate and misleading sub-head on folio 72, page 24, of Yick Wo transcript, viz: "*Respondent's Answer to Return.*" Where this came from we do not know, but it prefaces our admissions. The admissions were given to save time, and we stand by them. But we did not *answer* our own return.

The exceptions to the return are found in folio 99, on pages 31–2 of Yick Wo transcript, and folio 45, pages 15–16 of Wo Lee transcript.

We forwarded, March 23d, 1886, a written stipulation that the briefs in the Yick Wo case in court below should be considered in this court, and we sent, March 24th, 1886, a set of these briefs, also a set of mounted photographic exhibits.

It appears (folio 27, page 9, Yick Wo transcript) that petitioner was allowed fifteen days to file briefs, respondent ten days to reply; cause to be then submitted.

"Sept. 24. Filed petitioner's brief.

"Oct. 3. Filed respondent's brief, and submitted."

These briefs, on which this great contention was submitted, are some of "*the things concerning the same*" referred to in the writ of error. (*Vide* folio 57, p. 19, Yick Wo transcript.) We think they ought to be considered.

We find in folio 68, on page 30 of Wo Lee transcript, a reference to "the notorious public and municipal history of the times," and we ask if our supreme court may read this history as correctly as the circuit court, and if a difference should occur between the two courts as to this history, how shall the difference be solved?

Is there not "*a greater weight of judicial authority in this state*" against the charge of discrimination against the chinese, which is the burden of petitioner's complaint?

Is it not likely that the ten judges of our supreme court found correctly when they found that the order is not discriminating?

Is it to be supposed that the three court commissioners and the seven judges of our supreme court could be mistaken when they carefully examined these matters for three months (less a week), and here, upon the spot where the events have happened and where this history is made, decided that there is no such discrimination on account of race prejudice as the petitioner charges?

Does not this greater weight of judicial authority sustain the judgment of the supreme court of the state in its decision on the facts as well as in its decision on the law?

The decision of the supreme court of California was given December 28, 1885, and afterwards, on January 20, 1886, a similar petition was presented to the United States circuit court, and the federal court, following the ruling of the supreme court of California, remanded the petitioner Wo Lee. The issues and admissions were in both cases the same.

The case of Yick Wo, in the supreme court of California, was first in time, and unless reversed in this proceeding, it must stand as a precedent. In the absence of particular findings of fact, how can this court say that the supreme court of California erred in finding any fact in dispute? The return in *re* Wo Lee was filed January 22d, 1886 (*vide* folio 44, page 15, Wo Lee transcript). The exceptions as of same date, *vide* folio 45, pages 15–16, Wo Lee transcript. The judgment (*vide* folio 46, page 16, Wo Lee transcript) remands the petitioner.

In both courts the facts were substantially the same. In both, the judgment was the same. The reasoning of the court was different, but the same conclusion was reached in both cases. We claim that the issue is sharply presented, whether under the 14th amendment the states are prohibited from exercising the police powers which pertained to them from the foundation of the government to regulate a dangerous business *by a consent which should be granted for proper reasons and denied in their absence.* If this right has been surrendered by the states under the 14th amendment, it is important that the states should be informed of this limitation on their powers. It is evident that the states have not hitherto discovered this meaning in the 14th amendment.

We present to the notice of the court the elaborate citation of authorities to be found in the article of W. W. Thornton, pages 285–8, 7 C. L. M., March, 1886.

We concede that if the opposite conclusion is correct, these cases are of little weight; but we are satisfied that this court is not

expanding the power of the United States at the expense of the state, but on the contrary, it is limiting the powers of the federal government to those matters which the states surrendered to it, and among these matters we are very confident that the state did not surrender her right to regulate the laundry business. The tenth article of the federal constitution is fatal to the claims of the petitioners.

CONCLUSION.

We claim that we have shown that *the consent of the board*, which is so strongly objected to by plaintiff, has received the sanction of the twelve states named on page 43, *ante*, besides many other states we have not named for want of time. These states were all parties to the fourteenth amendment. It would be reasonable to suppose that they understood the contract which they made.

If the states have lost power to adopt or enforce this kind of regulation of police matters, it must be under the fourteenth amendment that the power is lost. The question is important. It affects not only the interests of San Francisco, but the interests of every state in our union.

Was such centralization of power intended by the fourteenth amendment? Congress has power to enforce the amendment by appropriate legislation. The power of congress is not exhausted. It can meet any exigency which may occur.

We say the order is not invalid on its face, and if, in the manner of its enforcement, there should be just grounds of complaint, the present laws of congress may give sufficient relief. If they do not, congress may make further provision. Is not this the better way?

In the presentation of this important subject we have cited adverse decisions because we wished to aid the court in reaching the correct conclusion. We have not attempted to suppress the truth, or to suggest a fact which might mislead. We have aimed to present fairly some of the many cases which support our views, designedly omitting to make full extracts from recent decisions of this court because such cases must remain in the knowledge of the court; and with becoming deference to the judgment of this august tribunal, from whose decision there is no appeal, we close our argument.

We submit our case. We believe that in both cases the judgments should be affirmed.

Respectfully,

ALFRED CLARKE,
H. G. SIEBERST,
Counsel for sheriff Hopkins, defendant and respondent.

Dated San Francisco, April 6th, 1886.

Service admitted.

L. H. VAN SCHAICK,
HALL McALLISTER,
D. L. SMOOT,
Counsel for Yick Wo and Wo Lee.

April 6th, 1886.

118-356

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

In re Tie Loy, on Habeas Corpus.

(THE STOCKTON LAUNDRY ORDINANCE CASE.)

February 16, 1886.

Laundries—Constitutional Law.—An ordinance which makes it an offense for any person to maintain or carry on a laundry wherein clothes are cleansed for hire within the habitable portion of the city of Stockton is unconstitutional and void.

Fourteenth Amendment.—Such ordinance violates the fourteenth amendment of the national constitution in the following particulars: 1. It abridges "the privileges and immunities of citizens of the United States;" 2. It violates the personal liberty of the citizen; 3. It operates to deprive the citizen of property without due process of law; 4. It deprives citizens of the equal protection of the laws.

Police Power.—The ordinance is not within the legitimate scope of the police power of the state, invoked to sustain it.

Section 753, Revised Statutes, authorizes the discharge of the petitioner.

Before Sawyer, Circuit Judge.

R. W. Bennett, for petitioner.

F. H. Smith, city attorney of the city of Stockton, and *Alfred Clarke*, for respondent.

Sawyer, Circuit Judge; The petitioner is in custody upon a charge of violating the provisions of an ordinance of the city of Stockton, which reads as follows:

Section 1. The establishment of public laundries and public wash-houses where clothes and other articles are cleansed for hire within those portions of said city other than the portions hereinafter especially mentioned being injurious and dangerous to public health and public safety, and prejudicial to the well-being and comfort of the community, it shall be unlawful for any person or persons to establish, maintain, carry on, or conduct, or cause to be established, maintained, carried on, or conducted, any public laundry or public wash-house within any portion of the city of Stockton other than that portion of said city lying west of Tule street and south of Mormon Channel.

Sec. 7. Any person violating any of the provisions of this ordinance shall be punished by a fine of not more than five hundred dollars, or by imprisonment not exceeding three months, or by both such fine and imprisonment.

This ordinance is much broader in its scope than any heretofore considered by this court. It absolutely and unconditionally forbids the keeping of a laundry for washing clothes for hire at any point within the inhabited, and even within the habitable, part of the city of Stockton, the remainder of the city being in the uninhabitable marshes and sloughs.

The isolated position of the laundry, the character of the structure,

and the perfection, or imperfection, of the appliances for rendering the operation safe, and free from unwholesomeness and offensiveness to the senses, are not factors to be considered under the ordinance. All must go, safe or unsafe, healthy or unhealthy, offensive or not offensive. It makes no difference what the character of the work is. No decision of any court in this state or elsewhere has been brought to the notice of the court holding an ordinance so sweeping and exclusive in its provisions to be valid since or even before the adoption of the fourteenth amendment to the national constitution. In my judgment, the case of Yick Wo, recently decided by the supreme court of California, cited the other day in Wo Lee's case, does not reach it, either in its facts or the principles involved. This ordinance does not regulate—it extinguishes. It absolutely destroys, at its chosen location an established ordinary business, harmless in itself, and indespensable to the comfort of civilized communities, and which cannot be so conveniently, advantageously, or profitably carried on elsewhere. On the other hand, it appears to the court that it is fully covered by the case of Yates *v.* Milwaukee, decided by the supreme court of the United States, 10 Wall., 505, which is authoritative. In that case the court says:

"The mere declaration by the city council of Milwaukee that a certain structure (a wharf) was an encroachment or obstruction did not make it so; *nor could such declaration make it a nuisance unless it, in fact, had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws, either of the city or of the state within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city at the uncontrolled will of the temporary local authorities.*"

If the rural city of Stockton, which, as usual in such cities, is, in the greater part, not compactly built up, has authority to prohibit within its inhabited limits the washing of clothes for hire, not only a useful but an absolutely necessary occupation in any civilized community, it is because it has the power to declare that occupation, and every other that may be followed by civilized man to be a public nuisance, without regard to the question whether it is in fact a nuisance or not. That is just what the Supreme Court of the United States says it cannot do.

If the city of Stockton can prohibit the washing of clothes for hire within its inhabited and habitable limits it can prohibit the washing of clothes by any citizen, for him or herself, anywhere within the city of Stockton. Washing *for hire* cannot make the operation a nuisance if it be not otherwise a nuisance. One may cook his dinner in such manner and under such conditions as to render the operation extremely dangerous, and constitute it a nuisance. Unfortunately this necessary and, ordinarily, harmless act has sometimes been so performed as to be dangerous. Does it follow, from this fact, that all the inhabitants of the city of Stockton may, under the police power of the State, be lawfully

prohibited from cooking their meals within the habitable limits of that city? It is not apparent why they may not be thus prohibited if this ordinance be valid under the power invoked or any other power. Indeed, if this ordinance be valid, it is difficult to perceive what rights the people of California have which a municipal corporation is bound to respect. Of course, no one can, in fact, doubt the purpose of this ordinance. It means: "The Chinese must go." And, in order that they shall go, it is made to encroach upon one of the most sacred rights of citizens of the State of California of the Caucasian race as well as upon the rights of the Mongolian. It should be remembered that the same clause in our constitution which protects the rights of every native citizen of the United States born of Caucasian parents equally protects the rights of the Chinese inhabitant who is lawfully in the country. When this barrier is broken down as to the Chinese it is equally swept away as to every American citizen; and in this instance the ordinance reaches American citizens as well as Chinese residents.

This occupation is not a nuisance *per se*, nor one that is *prima facie* a nuisance—like a slaughter-house, a house for the manufacture or storage of gunpowder, or dynamite, or many others that might be mentioned. It can only become a nuisance upon gross negligence, or carelessness, or gross imperfections in the arrangements and appliances by means of which it is carried on. It is one of the most common, ordinary, and necessary employments, in which every one may engage, as of common right, upon terms of equality, not only as to this employment, but upon terms of equality with those who engage in any other ordinary, necessary, or useful occupation. Cleanliness is necessary to civilization—necessary to the health, comfort, and happiness of a civilized people. Without it, every man, woman, and child would, individually, him or herself, become a nuisance to his or her neighbor. The right to labor in this or any other honest, necessary, and, in itself, harmless calling, where it can be most conveniently, advantageously, and profitably carried on without injury to others, is one of the highest privileges and immunities secured by the constitution to every American citizen and to every person residing within its protection.

In Ward *v.* Maryland the United States Supreme Court observes:

"Beyond doubt these words [privileges and immunities] are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the rights of a citizen of one state to pass into any other state of the Union for the purpose of *engaging in lawful commerce, trade, or business without molestation;* to acquire personal property, to take and hold real estate," etc., 12 Wall., 430.

So in the Slaughter-house Cases Mr. Justice Field remarks upon these terms: "*The privileges and immunities designated* are those which of right belong to citizens of all free governments. *Clearly among these must be placed the right to pursue a lawful employment in a lawful manner without other restraint than such as equally affects all persons,* 16 Wall., 97.

Justice Bradley in discussing the question as to what is embraced in the privileges and immunities secured to citizens, among other equally pointed and emphatic declarations, says: "*In my judgment the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of the most valuable rights and one which the legislature of a state cannot invade, whether restrained by its own constitution or not.*" 16 Wall., 113–114. He also enumerates as among the fundamental rights embraced in the privileges and immunities of a citizen all the absolute rights of individuals classed by Blackstone under the three heads: "The right of personal security, the right of personal liberty, and the right of private property." Id., 115. And in relation to these rights he says: "In my view a law which prohibits a large class of citizens from adopting a lawful employment, *or from following a lawful employment previously adopted, does deprive them of liberty as well as property without due process of law. Their right of choice is a portion of their liberty; their occupatian is their property. Such a law also deprives those citizens of the equal protection of the laws, contrary to the last clause of the section.*" Id., 122.

And Mr. Justice Swayne supports this view in the following eloquent and emphatic language: "*Life is the gift of God, and the right to preserve it is the most sacred of the rights of man. Liberty is freedom from all restraints, but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny. Property is everything which has an exchangeable value, and the right of property includes the power to dispose of it according to the will of the owner. Labor is property, and, as such, merits protection. The right to make it available is next in importance to the rights of life and liberty. It lies, to a large extent, at the foundation of most other forms of property.*" 16 Wall., 127. See Parrott's Case, 6 Saw., 373.

The police power is invoked to sustain this ordinance, but the police power only extends to the regulation of the necessary pursuits of man, so that they shall not become in their mode of exercise unhealthy, noisome, dangerous, or otherwise destructive or injurious to the common interests of the community. It does not extend to the destruction or driving to inconvenient and unprofitable localities of necessary or useful occupations, carried on in such manner as to be harmless.

It is not easy to define the police power by general terms in advance, so that it will embrace every case that ought to be embraced and exclude every case that ought to be excluded. In the recent case of the New Orleans Gas Light Co. *v.* Louisiana Light and Heat, etc., Co., the Supreme Court observes:

"In the Slaughter-house Cases, 16 Wall., 62, it was said that the police power is from its nature incapable of any exact definition or limitation; and in Stone *v.* Mississippi, 101 U. S., 818, that 'It is easier to determine whether particular cases come withing the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate."

And the court then added: "*Definitions of the police power must*

however, be taken, subject to the condition that the State cannot, in its exercise for any purpose whatsoever, encroach upon the powers of the general government or rights granted or secured by the supreme laws of the land," and under color of the police power "objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution." 6 Sup. Ct. R., 258.

It does not appear to me to be difficult to determine that this sweeping, exclusive, destructive, prohibitory ordinance, making it an offense to pursue one of the most ordinary and necessary occupations without regard to the manner of its pursuit or the character of the appliances with which it is carried on, is not within the police power of the state. To hold otherwise would, in my judgment, clearly be, under color of the police power, to take in "objects not within its scope" which "cannot be secured at the expense of the protection afforded by the federal constitution," and to "encroach upon . . . . rights granted and secured by the supreme law of the land," which, the supreme court says, cannot be done. If the foregoing extracts from the opinions of the justices of the supreme court give a correct idea of the privileges and immunities protected by the constitution of the United States, then this ordinance in question, it seems to me, violates that clause of the fourteenth amendment which says: "No state shall *make or enforce any law which shall abridge the privileges or immunities of citizens of the United States*," for this ordinance does absolutely prohibit not only Chinese, but citizens of the United States, from following within the inhabited part of the city of Stockton, under any circumstances, one of the most ordinary, necessary, and, when properly conducted, harmless occupations of civilized man.

Under the same definitions this ordinance also violates the clause which secures the personal liberty of the citizen. So, also, as the laundrymen have already fitted up their laundries suitably for the purpose and established their business, to now drive them out to inconvenient and unsuitable localities would be to limit the use of their property and convert it to other purposes and uses to which it is unfitted, and to that extent deprive them of their property and its use without due process of law, in violation of the last clause of section 2 of said amendment. So, also, to thus drive the laundrymen, unconditionally, out of Stockton, while other parties are entitled to wash clothes, not for hire, and where other parties are entitled to pursue other ordinary and no more necessary or less harmful occupations, is to deprive them of the equal protection of the laws within the meaning of the same inhibitory clause. Thus it seems clear to my mind that this ordinance violates the constitution of the United States in all the particulars indicated, and that it is utterly void. If so, the petitioner is "in custody in violation of the constitution of . . . . the United States" within the meaning of section 753 of the revised statutes, and he must be discharged.

The respondent relies upon article 11, section 11, of the state constitution to sustain the ordinance, which provides that "any county, city, etc., may make and enforce within its limits all such local police,

sanitary, and other regulations *as are not in conflict with general laws;*" also, the first clause of section 524 of the act of 1883, relating to cities of the class in question, giving power "to pass ordinances *not in conflict with the constitution and laws* of the state *or of the United States*;" and section 530, authorizing the common council to define nuisances. Laws 1883, pp. 211–214. But if the views presented are correct, this ordinance is not a "regulation" but a "destruction" of a lawful business, at the location selected for carrying it on, and does not fall within the police power of the state, and is "in conflict with general" and the supreme "law" of the land—the national constitution—and is not within any lawful power so conferred by either the state constitution or statutes of the state.

In pursuance of the views expressed the petitioner must be discharged, and it is so ordered.

118-356

IN THE

Supreme Court of the United States.

WO LEE, Appellant, v. PETER HOPKINS, Sheriff of the City and County of San Francisco, California, Appellee.	*Habeas Corpus. On Appeal from the Circuit Court of the United States for California.*
YICK WO, Plaintiff in error. v. PETER HOPKINS, Sheriff of the City and County of San Francisco, California, defendant in error.	*Habeas Corpus. Writ of Error to the Supreme Court of California.*

MOTION TO ADVANCE.

Because the above named cases involve the same questions it is respectfully asked that they may be heard together; And because the records disclose a successful subversion of the Federal Constitution and the treaties with China, to the positive detriment of the petitioners and the hundreds of others similarly situated, the Court is respectfully asked, with the concurrence of counsel on the other side, to hear these cases at the present term.

Counsel *pro et con.* have entered into and filed the following stipulation, viz:

" IN THE SUPREME COURT OF THE UNITED STATES.

" WO LEE, Appellant.

" v.

" PETER HOPKINS, Sheriff of the City " and County of San Francisco, California, " Appellee.

Habeas Corpus. On Appeal from the Circuit Court of the United States for California.

" YICK WO, Plaintiff in error.

" v.

" PETER HOPKINS, Sheriff of the City and " County of San Francisco, California, defend- " ant in Error.

Habeas Corpus. Writ of Error to the Supreme Court of the State of California.

"As the above cases involve the same questions it is agreed " that they may be heard together; and as they are criminal pro- " ceedings and raise questions of general public interest under the " Federal Constitution and laws, and the treaties between the " United States and China, in which the United States are con- " cerned, it is further agreed that the said cases may be heard at " the earliest day which it may be the pleasure of the Court to fix " with out reference to the return days of the writ and citations or " the time when the said cases should be docketed under the " rule. The purpose of both parties being to secure a decision of " the public questions involved at the earliest day possible.

"Witness our signatures at San Francisco, Cal., this March 1st, 1886.

" H. G. SIEBERST,
" ALFRED CLARKE.
"*Counsel for Respondent and Deft. in Error.*

" HALL McALLISTER,
" L. H. VANSCHAICK,
" and D. L. SMOOT,
Counsel and Attorneys for Wo Lee and Yick Wo above named.

The records in these cases show that personal and property rights to a vast extent are utterly unprotected and threatened with immediate destruction if the ingenuity of hostile legislation is equal to the task of defeating the evident purpose of the constitutional and treaty guarantees upon which the petitioners beg leave to rely.

Respectfully Submitted,

D. L. SMOOT,
Counsel for Wo Lee and Yick Wo.

WASHINGTON, D. C., March 31st, 1886.